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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1999

LABORERS LOCAL 17 HEALTH AND BENEFIT FUND, ET AL.,

*Petitioners*,

*v.*

PHILIP MORRIS, INC., ET AL.,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. This case presents a similar question to that in *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris*, No. 99-545 and *Oregon Laborers-Employers Health & Welfare Fund v. Philip Morris*, No. 99-642 (pending on certiorari): Whether health care payors can be deprived of standing to sue under the federal RICO statute for injury to their "business or property" caused by tobacco company defendants, on the ground that such suits are too "remote" and "indirect" as a matter of law, even though:

- the payors directly paid the medical costs in question and are the *only* plaintiffs that can assert RICO claims to recover those costs — smokers cannot;

- relegating payors or smokers to piecemeal products liability lawsuits based on state law would completely defeat Congress' purpose of providing, in the RICO statute, potent remedies against persistent patterns of enterprise misconduct;

- measuring the payors' aggregate damages statistically would be *easier* and *more reliable* than ascertaining damages in separate personal injury claims by individual smokers; and

- the holding of the court of appeals below conflicts with numerous other decisions in the lower courts.

2. In addition, this case presents the question whether the "remoteness" factors applicable to requests for damages also apply to claims seeking injunctive relief under RICO.

## PARTIES TO THE PROCEEDING

The plaintiffs in the district court (appellees in the court of appeals) were:

Laborers Local 17 Health and Benefit Fund
Transport Workers Union New York City Private Bus Lines Health Benefit Trust
United Federation of Teachers Welfare Fund
Communications Workers of America Local 1180 Security Benefits Fund
International Union of Operating Engineers, Local 891 Welfare Fund
Social Service Employees Union Local 371 Welfare Fund, on behalf of themselves and all others similarly situated.

The appellees below (defendants in the district court) were:

Philip Morris, Inc.
R.J. Reynolds Tobacco Company
Brown & Williamson Tobacco Corporation
B.A.T. Industries, P.L.C.
Lorillard Tobacco Company, Inc.
Liggett & Myers, Inc.
The American Tobacco Company
United States Tobacco Company
The Council for Tobacco Research — USA, Inc.
The Tobacco Institute, Inc.
Smokeless Tobacco Council, Inc.
Hill & Knowlton, Inc.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Laborers Local 17 Health and Benefit Fund *et al.* ("Health Trusts") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals, as amended on August 18, 1999, (App. 1a-25a) is not yet reported. The order of the district court (App. 26a-53a) is reported at 7 F. Supp.2d 277.

## JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, 1337, 1367; 15 U.S.C. §§ 15, 26; and 18 U.S.C. § 1964. The court of appeals had subject matter jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Second Circuit issued its initial opinion on April 9, 1999 and its amended opinion on August 18, 1999. The Health Trusts' timely filed petition for panel rehearing and suggestion for rehearing en banc was denied on August 6, 1999.

## STATUTORY PROVISIONS INVOLVED

The relevant portions of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") are reproduced at App. 59a-60a.

## STATEMENT

This case presents a question of enormous legal and public significance which is also presented by *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris*, No. 99-545 and *Oregon Laborers-Employers Health & Welfare Fund v. Philip*

*Morris*, No. 99-642 (pending on certiorari): whether, in a case in which the facts show a persistent and deliberate pattern of violations of the RICO statute, courts may deny standing to plaintiffs that have borne the resulting economic costs. This question is related to that in *Beck v. Prupis*, No. 98-1480, which involves the proper interpretation of the proximate cause factors of *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), in a case brought by a terminated employee under RICO.

In addition, this case presents the question whether the *Holmes* factors applicable to requests for damages under RICO also apply to claims seeking injunctive relief.

The plaintiffs in this case are six non-profit employee health trust funds that pay for medical benefits to workers, retirees, and their families. The defendants are tobacco companies and related industry members. The tobacco defendants are alleged to have engaged in a decades-long fraudulent scheme to preserve their markets and avoid the costs of treating smoking-related diseases by counteracting smokers' efforts to quit; impairing health providers' ability to reduce costs through effective smoking cessation programs and safer cigarettes; and concealing the industry's active role in manipulating and perpetuating the resulting health care crisis.

Defendants' misconduct constitutes the core type of wrongdoing for which Congress determined, in enacting RICO, that the preexisting state and common law remedies were inadequate. Congress therefore supplemented governmental enforcement efforts with the litigation resources of affected businesses.

The Second Circuit did not doubt the sufficiency of plaintiffs' RICO allegations. But the court held that the Health Trusts lacked standing to sue as a matter of law under RICO to recover their damages, on the ground that the injury to the Trusts' business and property was "derivative" and could not survive under the proximate cause doctrine of "remoteness" — simply because tobacco inflicts bodily injury on smokers in the

course of causing economic harm to the Health Trusts. App. 15a-16a.

The results of the court's holding are profound. First, it disqualifies on standing grounds the *only* plaintiffs that paid the medical costs at issue and suffered the economic loss to their business or property — i.e., the *only plaintiffs otherwise legally able to assert these RICO claims*. Second, the holding below thereby relegates claimants against the tobacco industry to the state and common law remedies that Congress found to be historically *inadequate* when enacting RICO. Third, the Second Circuit's denial of standing to the Health Trusts because the defendants have effectuated their scheme and ensured their profits by first causing bodily injury to persons connected to their business (their customers) ignores the fact that traditionally wrongdoing by RICO enterprises has often involved bodily injury, and it is accordingly perverse to exclude that misconduct from the ambit of the statute on standing grounds.

Although this cases arises in the context of tobacco, the decision below implicates broader and deeper issues of standing under federal statutes. The Second Circuit, while acknowledging that individual smokers could not bring RICO actions, maintained that they could "pursue their own [state law] causes of action for such additional types of injuries as pain and suffering." App. 20a. Yet this Court has *never* countenanced dismissal of a RICO (or antitrust) claim as too indirect without identifying a more directly injured party with the ability and incentive to sue to remedy the *same* statutory violation. Nor has this Court allowed narrow readings of RICO to undermine the broad remedial purposes of the statute. If the decision below is permitted to stand, then RICO is subject to a standing requirements that contradicts its very statutory purpose.

Therefore, this is not just a tobacco case. The Second Circuit's judgment conflicts with numerous decisions outside the tobacco context and has sweeping implications beyond tobacco. In a complex economy, injuries to business and property are often mediated through effects on third parties. If a claim involving a straightforward and well documented causal

chain can be disqualified simply because the chain can be described as indirect, then the RICO statute will be eviscerated. The Second Circuit created a new requirement for "direct" injury that conflicts with this Court's decisions in *Sedima, SPRL v. Imrex Co.*, 473 U.S. 479 (1985); *Holmes v. SIPC*, 503 U.S. 258 (1992); *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994); *Associated General Contractors v. California State Council*, 459 U.S. 519 (1983) (*AGC*); and *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982).

There is a clear and deep division among the lower courts warranting certiorari. The Second Circuit's decision depriving health care payors of standing conflicts with such decisions as *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996), and *Steele v. Hospital Corp. of America*, 36 F.3d 69 (9th Cir. 1994), which grant RICO and antitrust standing *only* to the health care payor, *not* to the individuals suffering bodily injury.

In addition, the Second Circuit's judgment conflicts with decisions in state tobacco litigation. Beginning in 1994, more than 40 state attorneys general sued the tobacco industry for health care costs borne by state treasuries. Many of these suits sought recovery for *state employee* health and welfare funds — the same type of recovery plaintiff Health Trusts seek here. In the state litigations court after court rejected the same remoteness argument adopted by the Second Circuit in this case. Only one state suit (in Indiana) was dismissed in its entirety, in a two-page order supplying no analysis or reasoning. The tobacco industry chose to settle the state suits for over $200 billion.

The Second Circuit's decision also merits review in light of the lawsuit filed by the United States on September 22, 1999 against the tobacco industry in the United States District Court for the District of Columbia, seeking recovery of smoking-related health care costs for Medicare recipients, veterans, military personnel, and federal employees. That lawsuit relies on the same allegations of industry misconduct as asserted by

the Health Trusts in this case, and also includes RICO as one of its principal claims.

1. ***The history of defendants' fraudulent conspiracy.*** As the United States has explained in its recently filed lawsuit, the tobacco companies "have repeatedly and consistently denied that smoking cigarettes causes disease, even though they have known since 1953, at the latest, that smoking increases the risk of disease and death. [They] have repeatedly and consistently denied that cigarettes are addictive even though they have long understood and intentionally exploited the addictive properties of nicotine. [They] have repeatedly and consistently stated that they do not market cigarettes to children while using advertising and marketing techniques to make their products attractive to children. Even though they have long understood the hazards caused by smoking and could have developed and marketed less hazardous cigarette products, [they] chose and conspired not to do so." Complaint in *United States v. Philip Morris, Inc.*, ¶ 4 (D.D.C. Sept. 22, 1999).

For example, despite the industry's claim that it does not target youth smokers, internal industry documents refer to children as "new replacement smokers" and contain such statements as:

". . . [T]he base of our business is the high school student."

". . . [W]e must get our share of the youth market."

"It is important to know as much as possible about teenage smoking . . . . [S]moking patterns of teenagers are particularly important to Philip Morris."

The industry also has denied that nicotine is addictive and that the companies manipulate nicotine levels. On April 14, 1994, the chief executives of all seven major cigarette manufacturers made such statements under oath before the House Subcommittee on Health and the Environment. William Campbell, then CEO of Philip Morris USA, testified that "I believe nicotine is not addictive." RJR CEO James W. Johnston testified that "smoking is no more addictive than coffee, tea or Twinkies."

Yet internal tobacco company documents show that such statements are false. A 1972 Philip Morris report stated: "The cigarette should be conceived not as a product but as a package. The product is nicotine. . . . Think of the cigarette as a dispenser for a dose unit of nicotine." A 1972 RJR memo concluded: "In a sense, the tobacco industry may be thought of as being a specialized, highly ritualized, segment of the pharmaceutical industry." A Brown & Williamson scientist wrote in 1963: "I think that we can say even now that we can regulate, fairly precisely, the nicotine and sugar levels to almost any desired level management might require."

The industry also has suppressed the development of safer cigarettes. For example, Dr. James Mold of Liggett & Myers has stated that scientists "produced a cigarette which was, we felt, commercially acceptable as established by some consumer tests, which eliminated carcinogenic activity." However, all meetings on the project were attended by lawyers, and "[w]henever any problem came up on the project, the Legal Department would pounce upon that in an attempt to kill the project, and this happened time and time again." Liggett never marketed the safer cigarette, and its president "was told by someone in the Philip Morris Company that if we tried to market such a product that they would clobber us."

In addition, the industry has lied to the courts and abused the judicial process. The companies have fraudulently asserted privileges for various incriminating documents by cycling them through their legal departments and outside law firms.[1]

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[1] *See American Tobacco Co. v. Florida*, 697 So. 2d 1249, 1257 (4th Dist. Fla. App. 1997) ("There was also evidence that the defendants utilized their attorneys in carrying out their misrepresentations and concealment to keep secret research and other conduct related to the true health dangers of smoking."); *Minnesota v. Philip Morris, Inc.*, No. C1-94-8565, slip op. (Minn. Dist. Ct. May 8, 1997) ("Plaintiffs . . . have made a *prima facie* case to invoke the crime fraud exception"), and slip op. (Dec. 16, 1997) ("review of the documents reveals a conspiracy of silence and suppression of scientific research").

Dr. Jack E. Henningfield, who for 16 years served as an official of the National Institute on Drug Abuse (part of the National Institutes of Health) has described the industry's public posture as "lying and deceit and fraud." The Journal of the American Medical Association has editorialized that "the evidence is unequivocal — the U.S. public has been duped by the tobacco industry. No right-thinking individual can ignore the evidence." *The Brown & Williamson Documents: Where Do We Go From Here?*, 274 JAMA 256, 258 (July 19, 1995).

Not surprisingly, the Florida trial court hearing the state's claim against the tobacco industry opined that the allegations "would seem to make out a case for 'the mother of all RICO actions.'" *Florida v. American Tobacco Co.*, No. CL95-1466, slip op. (Fla. Cir. Ct. Dec. 13, 1996).

**2.** ***Defendants' efforts to target third-party health payors.*** A primary aim of defendants' conspiracy was to externalize health care costs so that they would be paid by third-party payors such as Heath Trusts. For example, internal tobacco company memoranda obtained by the State of Texas in its lawsuit admitted that "costs associated with smoking and health are not social costs but transfer payments." Specific among the costs identified by the tobacco companies were "hospital costs, other medical treatment, G.P. consultations, pharmaceutical, preventive medicine, rehabilitation, capital investment in medical facilities and research." Philip Morris acknowledged that "as health care costs rise astronomically, the opposition becomes armed with more potent weapons."

**3.** ***Nature of the plaintiff health trusts.*** This suit was brought by six health funds representing thousands of union and public-sector workers and retirees and their families. Plaintiffs Laborers Local 17 Health & Benefit Fund and the Transport Workers Union New York City Private Bus Lines Health Benefit Trust are labor union health and welfare trust funds established pursuant to the Taft Hartley Act, 29 U.S.C. § 186(c)(5), and the Employee Retirement Income Security Act, 29 U.S.C. § 1002(1), 1002(3). Plaintiffs United Federation of Teachers Welfare Fund, Communications Workers of

America Local 1180 Security Benefits Fund, International Union of Operating Engineers Local 891 Welfare Fund, and Social Services Employees Union Local 371 Welfare Fund are non-for-profit trusts which were established to supplement public-sector employees' basic medical benefits.

The Health Trusts are legally distinct entities from the unions sponsoring them and the employers whose workers are covered by them. Nationwide, such non-profit health trusts provide benefits to some 33 million American workers, dependents, and retirees and play a vital role in our national health care system. Each trust is governed by a board of trustees who administer the trusts for the sole benefit of the covered workers and dependents. With the help of professional consultants and administrators, the trustees decide what benefit programs will be maintained by the trusts (types of health benefits, benefit levels, eligibility, and so on). Any increases in tobacco-related medical costs act to deplete the funds available to pay for other treatment or preventive care, for smokers and non-smokers alike.

**4.** ***Procedural history.*** The complaint asserted claims under the federal RICO and antitrust statutes, as well as under New York common law. Plaintiffs sought damages as well as equitable relief.

The district court granted the defendants' motion to dismiss in part and denied it in part. The court sustained plaintiffs' federal RICO claims; the state common-law claim of fraud, misrepresentation and concealment; and the state common-law claim of breach of a specially assumed duty.[2] The court found proximate cause linking plaintiffs' injuries to the defendants' unlawful conduct and concluded not only that the Health Trusts had standing to assert a RICO cause of action but also that they stated a prima facie case with respect to the state common law fraud claims. The court held that plaintiffs' injuries were fore-

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[2] The court dismissed plaintiffs' antitrust and unjust enrichment claims and also dismissed, with plaintiffs' consent and without prejudice, the claims of strict liability, negligence, and breach of express and implied warranties.

seeable and not too remote as a matter of law, applying the factors articulated in *Holmes*. "There is a substantial risk that those harms will go unremedied if this action is not allowed to continue." App. 34a. The court also held there was no risk of multiple recoveries for the same harm. "No other party may recover for harm to the Funds' infrastructure, financial stability, or ability to project costs. To the extent that the harm took the form of increased expenses for medical care, those costs will only be recovered once. . . . Because costs borne only by the Funds are recoverable only by the Funds, there can be no risk of multiple recoveries." App. 34a. The court further held that the Health Trusts' damages were not impermissibly speculative.

Recognizing the importance of this case, the district court nonetheless certified the remoteness issue for interlocutory review, together with the question of whether the Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-40, preempted plaintiffs' state law fraud and breach of special duty claims.

The court of appeals granted leave to appeal these certified questions and reversed. The Second Circuit recognized that the complaint "seeks damages inflicted on the Funds' infrastructure independent of the harm suffered by plan participants. These latter damages, alleged to be separate and wholly distinct from participants' medical costs, consist of losses suffered due to the Funds' inability to control costs, to promote the use of safer alternative products, and to establish programs to educate their participants not to use tobacco products." App. 4a. The court of appeals also acknowledged that "[a]ny discussion of proximate cause should be approached with some trepidation because, as a scholarly treatise teaches, no topic is subject to more disagreement or such confusion." App. 8a.

Nonetheless, the court purported to identify a black-letter rule that "plaintiffs who are obligated to pay the medical expenses of another may not recover against the tortfeasor who caused the damage, because they injuries are indirect since they derive wholly from the injuries sustained by the third party." App. 9a. The Second Circuit held, the Health Trusts'

"damages are entirely derivative of the harm suffered by plan participants as a result of using tobacco products. . . . Being purely contingent on harm to third parties, these injuries are indirect." App. 16a. The court of appeals also opined that the Health Trusts' damages were impermissibly speculative because they stemmed from "fraudulently induced inaction" and that "a possibility of duplicative recoveries exists" because individual smokers might pursue separate product liability actions. App. 17a, 19a.

The Second Circuit went so far as to dismiss plaintiffs' equitable claim under RICO, despite the fact that the *Holmes* factors do not apply to claims for injunctive relief.

Plaintiffs moved for rehearing. The Second Circuit withdrew its original opinion, reconsidered the matter for twelve weeks, and issued an amended opinion reaching the same result but including new footnotes, inconsistent in tone and substance with the text. App. 7a, 15a nn.3, 4. The court of appeals then denied the petition for rehearing.

## REASONS FOR GRANTING THE WRIT

The Second Circuit substituted a new test of proximate cause for the standard established by Congress. The RICO standing inquiry uses three factors to identify the best plaintiff to bring suit and then concentrates the statutory cause of action in that person. In this case, the Second Circuit held that the *only* possible plaintiffs to assert the RICO claims for the medical costs in question — the Health Trusts which have suffered the injury to business and property interests protected by RICO — are unable to sue. The court of appeals' judgment conflicts with the decisions of this Court in *Holmes*, *NOW v. Scheidler*, *AGC*, and *McCready*, and with numerous decisions in the lower courts. Noted antitrust commentators have strongly criticized the approach taken by the Second Circuit approach. Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW at 95 & n.8 (1999 supp.).

The Second Circuit's opinion also conflicts with a recent decision of the Third Circuit dismissing similar claims by different health trusts in *Steamfitters Local Union No. 420 v. Philip Morris, Inc.*, No. 99-545 (pending on certiorari). The Third Circuit, although ruling for the tobacco defendants, determined that there were no more-directly-injured parties who could sue and that duplicative damages and apportionment were not serious problems. App. in No. 99-545 at 25a-26a & nn. 9-10. The Third Circuit concluded that there is "little danger of duplicative litigation or complex apportionment of damages among various groups of plaintiffs." *Id.* at 25a-26a. The Second Circuit took a contrary view, asserting that smokers filing personal injury product liability suits would present a danger of duplicative recovery and complex apportionment of damages. App. 18a-19a. The disagreements between the Second and Third Circuits reinforce the need for certiorari.

This case is also related to *Beck v. Prupis*, No. 98-1480, which involves the proper application of the *Holmes* factors in a case brought by a terminated employee under RICO. *Beck* thus presents related questions of proximate cause.

In addition, this case presents the question whether the *Holmes* factors applicable to requests for damages also apply to claims seeking injunctive relief under RICO. In *Cargill v. Monfort of Colorado*, 479 U.S. 104, 111 n.6 (1986), this Court held that the *Holmes* factors do not apply to injunctive claims under the antitrust laws. The Second Circuit's judgment flies in the face of this decision and conflicts with numerous other decisions in the lower courts.

## I. This Court Should Grant Review on the RICO Standing Question.

RICO was intended to overcome limitations in state law by affording a potent new remedy to those whose business and property is injured by wrongdoing. "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima v. Imrex Co.*, 473 U.S. 479, 498

(1985). "Congress' concern [in enacting RICO] was not for the direct victims of the racketeer's acts, whom state and federal laws already protected, but for the competitors and investors whose businesses and interests are harmed or destroyed by racketeers." *Id.* at 519 (Marshall, J., dissenting). Congress explicitly found that existing "sanctions and remedies" were "unnecessarily limited in scope and impact" and that "enhanced sanctions and new remedies" were needed. Pub. L. No. 91-452, §1, 84 Stat. 922, 923 (1970). RICO states that its provisions "shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947. Indeed, one of Congress' objectives was to address defects and limitations in state law and state court proceedings. *See* RICO's "Statement of Findings and Purpose," Pub. L. 91-452, 84 Stat. 922 (1970). "Congress enacted RICO in order to supplement . . . the available remedies [under federal and state law] since it thought those remedies offered too little protection for the victims." *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 392 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

Yet under the Second Circuit's ruling, the entire health care industry — one of the largest and fastest-growing segments of the United States economy — is disabled from suing the tobacco industry under RICO for inflicting billions of dollars in medical costs through schemes to defraud. The case is part of a larger controversy pitting the parties who finance the American health care system against those responsible for many of its costs. The injuries to business and property caused by the tobacco companies "have allegedly undermined the financial health and stability of a critical industry in this nation — that devoted to health care of millions of people." *National Asbestos Workers Medical Fund v. Philip Morris*, No. 98 CV 1492, mem. op. at 31 (E.D.N.Y. Sept. 7, 1999). "This is arguably precisely the type of economic injury which RICO was designed to address and deter." *Id.* at 32.

The Second Circuit effectively bestowed a civil immunity on tobacco companies that Congress repeatedly has refused to

legislate. By itself, the significance of tobacco litigation would warrant certiorari. There is a clear national interest in holding tobacco companies accountable for the public health devastation they have wreaked. More than 40 states have sued the tobacco industry since 1994. On Sept. 22, 1999, the United States brought its own lawsuit under RICO and other statutes to recover tobacco-related federal health care costs. This Court currently is considering the industry's challenge to anti-smoking regulations adopted by the Food and Drug Administration, which the Solicitor General has described as being "of overriding public importance" and as presenting "an unparalleled opportunity to prevent millions of children from beginning a highly addictive habit that often leads to premature death."[3] When this Court granted the FDA's petition for certiorari, the President stated that "I am very pleased that the Supreme Court has agreed to take up the case regarding the Food and Drug Administration's regulation of tobacco products. . . . Every day, 3,000 young people become regular smokers and 1,000 will have their lives cut short as a result." The immunity granted to the tobacco companies by the Second Circuit flies in the face of the national interest in holding them responsible for their misconduct.

Moreover, the decision below carries enormous implications beyond the tobacco context. A black-letter rule barring all claims by parties who pay the medical expenses of others would be absurd. For example, fraudulent overbilling or anti-competitive price-fixing by a cancer medicine supplier would not be actionable by the payor because it would not create any costs unless some third party cancer patient needed the medicine. Going beyond the health field, many injuries to business and property that Congress sought to remedy in RICO involve multiple causation steps. If that alone were enough to render the statute inapplicable, Congress' handiwork would be significantly nullified. Thus, noted authorities have emphatically

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[3] Petition for Certiorari in *FDA v. Brown & Williamson Tobacco Corp.*, No. 98-1152.

disagreed with the standing analysis adopted by the Second Circuit. Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW at 95 & n.8 (1999 supp.).

### A. The Decision Below Conflicts With Decisions of this Court

For cases involving a causal chain that includes several potential plaintiffs harmed at different levels by a defendant's misconduct, this Court has formulated three policy factors to determine whether a given plaintiffs' injury is sufficiently proximate or direct to sustain an action for damages under RICO:

(1) Whether more "directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely."

(2) Whether "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risks of multiple recoveries."

(3) Whether indirectness makes it "more difficult to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors."

*Holmes*, 503 U.S. at 269.

The purpose of these factors is to identify which of several possible plaintiffs will be given standing to sue for a RICO violation. The aim, in other words, is to produce the *best* plaintiff. The decision below produced *no* plaintiff. This Court has *never* dismissed a claim as too indirect without identifying a more directly injured party who could sue to remedy the same violation. In this case, the Health Trusts are the only potential plaintiffs that have suffered the economic losses at issue, and the only possible plaintiffs legally able to sue. The Second Circuit's holding that the Trusts are too "remote" from the injuries inflicted by the defendants reflects a lack of understanding

of our health care system. Americans do not pay for their health care directly. Rather, our system spreads the costs of health care through entities like the Trusts. Smokers do not have redress for most medical payments relating to their tobacco-related illnesses because they do not make the payments; the Health Trusts do.

Further, the Trusts, as special and favored creatures of federal law, are the most natural plaintiffs. Congress has bestowed on them the authority to sue in their own names, 29 U.S.C. § 1132(d)(1), and charged them with "ensur[ing] that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries." *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 571 (1985). Congress has specifically provided that the trusts are not be regulated as insurers, *see* 29 U.S.C. § 1144(b)(2)(B), thus casting grave doubt on any suggestion that the trusts should sue in subrogation on behalf of their participants — wholly apart from the fact that proceeding smoker-by-smoker in subrogation would be so expensive as to be utterly impractical. *See Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 36 F. Supp.2d 560, 581 (E.D.N.Y. 1999) ("In the same way that a spouse or a parent has an obligation to provide for the medical injuries of his spouse or child, non-profit medical providers . . . have an obligation to supply medical care to their covered populations. . . . [P]laintiffs occupy a type of *parens patriae* relationship with their insureds which is analogous to the parent-child relationship.").

As health care payors for some 33 million American workers, dependents, and retirees, many of whom would otherwise lack coverage, health trusts play a major role in the health care delivery system in this country and accordingly are appropriate parties to enforce RICO. Indeed, the trusts represent the groups most at risk from smoking. Nine million people served by trusts are addicted smokers. Over 45 percent of workers are current smokers; over 40 percent of blue collar workers' children become hard-core smokers; and at least 25 percent of blue collar smokers continue to use cigarettes during pregnancy.

The trusts spend over 10 percent of their budgets on treating smoking-related illnesses.

Thus, this is a not a case of selecting among several possible RICO plaintiffs. There is only one group of candidates, and its members are perfectly suited to asserting the claims. In ruling otherwise, the court of appeals did not merely misapply the *Holmes* factors; rather, it created what amounts to a new legal test for proximate cause under RICO, one which turns the concept of "standing" on its head.

1. ***Directness Is a Policy Conclusion, Not a Separate Factor.*** The Second Circuit improperly treated the supposedly "indirect" and "derivative" nature of the Health Trusts' injuries as a separate factor and in fact created a black-letter rule: "[T]he critical question posed by the direct injury test is whether the damages a plaintiff sustains are derivative of an injury to a third party. If so, then the injury is indirect; if not, it is direct." App. 15a.

This Court has rejected that approach. Calling a particular causal chain "indirect" or "remote" is merely a conclusion that follows from applying the relevant policy factors. The proximate cause inquiry is not determined by any formal rule of indirectness. *See AGC*, 459 U.S. at 536 n.33 (specifically rejecting the black-letter "directness of the injury" or "target area" tests, stating that instead "courts should analyze each situation in light of the factors set forth in the text"); *see also Holmes*, 503 U.S. at 272 n.20.

This Court has held repeatedly that a plaintiff may sue even when his injury is derived from the effects of the defendant's misconduct on intervening third parties. In *Holmes*, the Court recognized that its holding did not necessarily bar indirect claims (1) by brokerage clients suing for manipulation of stock they purchased from the brokerage firm, *see*, 503 U.S. at 272 n.19, and (2) by nonpurchasing brokerage clients suing for stock parking that had the effect of evading the firm's capital requirements. *Id.* And in *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994), this Court indicated that a business has standing to sue for injuries to its property by

virtue of racketeering-inflicted personal injuries to its workers. The fact that the predicate RICO acts were directed at third parties (the worker) did deprive the plaintiff businesses of standing: "nothing more [was] needed to confer standing . . . at the pleading stage" than the allegations that the anti-abortion activists conspired to inflict or threaten to inflict physical injury "the induce clinic staff and patients to stop working and obtain medical services elsewhere." *Id.*[4]

The Second Circuit's judgment also conflicts with other federal decisions outside the tobacco context holding that indirectly injured plaintiffs have RICO standing even though they were not the party directly deceived by the defendants' misconduct. In *Mid Atlantic Telecom. Corp. v. Long Distance Servs.*, 18 F.3d 260 (4th Cir. 1994), for example, the Fourth Circuit held that a plaintiff telecommunications carrier had

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[4] This Court has taken the same approach in antitrust cases. In *AGC*, this Court opined that unionized subcontractors, who were the secondary victims of coercion by the defendants, would have antitrust standing even though their injury was indirect. *See* 459 U.S. at 541-42. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), this Court held that a Blue Cross plan participant had antitrust standing to bring suit against an alleged unlawful conspiracy between Blue Cross and participating psychiatrists, which was aimed not at the plaintiff but at psychologists. Similarly, *Allied Tube v. Indian Head*, 486 U.S. 492, 495-96 (1988), held that a manufacturer of plastic conduit could sue a manufacturer of steel conduit who improperly influenced a trade association, which in turn promulgated a safety code that contained false product safety information about plastic conduit, which in turn influenced market participants either not to use plastic conduit or (even more indirectly) to disapprove its use by others. In *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977), this Court recognized that indirect purchasers could bring suit when a direct buyer passed on the full price increase through a cost-plus contract. *Id.* at 736 *See American Soc'y v. Hydrolevel*, 456 U.S. 556, 560-64 (1982) (plaintiffs allowed to sue when defendant deceptively caused standard-setting nonprofit to issue misleading interpretative letter that in turn misled customers into not using plaintiffs' products); *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (plaintiffs allowed to sue for securities fraud that deceived stock market professionals, who in turn affected the market price, which in turn harmed plaintiffs).

RICO standing to sue competing telephone company that deceived customers with artificially low rates and thus enticed them away from plaintiff. The court rejected "a rule that only injuries suffered by the immediate victim of a predicate act satisfied the 'by reason of' requirement of § 1964(c)" in favor of a "proximate cause analysis" that "should focus on the temporal and circumstantial relationship between the defendant's conduct and the injury suffered by the plaintiff, and the foreseeability that intervening events would cause injury to the plaintiff." *Id.* at 263. *See also Steele v. Hospital Corp. of America*, 36 F.3d 69, 70-71 (9th Cir. 1994) (concluding that an insured could not sue under RICO for money paid by his insurer because only the insurer had suffered the economic loss).[5]

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[5] *See also Khurana v. Innovative Health Care*, 130 F.3d 143, 151-52 (5th Cir. 1997) ("RICO civil standing is not limited to only the immediate victim of a defendant's RICO violation." It is enough that indirect injury was "foreseeable by the defendants and could certainly be anticipated as a natural consequence of their alleged misrepresentations"), *vacated as moot*, 119 S. Ct. 442 (1998);

*Israel Travel v. Israel Identity Tours*, 61 F.3d 1250, 1257 (7th Cir. 1995) (*Holmes* did not preclude RICO standing for plaintiff who alleged defendant deceived its customers into not doing business with plaintiff, because in *Holmes*, "the Supreme Court observed that it did not mean to preclude all possibility of recovery for injury that was transmitted indirectly");

*Raybestos Products Co. v. Younger*, 54 F.3d 1234, 1241-43 (7th Cir. 1995) (business has RICO standing to sue for intimidation directed at its customers);

*Beiter v. Blomquist*, 987 F.2d 1319, 1325 (8th Cir. 1993) (plaintiff has RICO standing to sue defendant for bribing government official, which resulted in denial of plaintiff's zoning application);

*Standardbred Owners Ass'n v. Roosevelt Raceway Assocs.*, 985 F.2d 102, 105 (2d Cir. 1989) (defendant who defrauded racetrack owner could be sued by those who in turn depended on racetrack for their livelihood, including "horse owners, trainers, drivers, grooms, blacksmiths, veterinarians, racing officials and pari-mutual clerks": "The test of proximate cause [under RICO] is whether the defendant's acts 'are a substantial factor in the sequence of responsible causation' and whether 'the injury is reasonably foreseeable or anticipated as a natural consequence.'");

*Prudential Ins. v. United States Gypsum*, 828 F. Supp. 287, 289-92 (D.N.J. 1993) (asbestos makers who deceived those who bought their products and suppressed safer products could be sued by plaintiffs who did not buy asbestos but subsequently bought buildings containing asbestos).

Even if formalistic indirectness were a relevant factor, it could not possibly justify dismissing the claim (under the one-link causal chain) that plaintiff health funds were *directly* lied to, defrauded, and deprived of the benefits of new and safer tobacco products. The effect of defendants' misconduct on the Health Trusts was not mediated through any effect on a third party.

2. ***No More-Directly-Injured Party Could Sue.*** The court of appeals acknowledged that individual smokers could not assert RICO claims against the tobacco companies. But the court

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*R.R. Brittingham v. Mobil Corp.*, 943 F.2d 297, 304 (3d Cir. 1991) (RICO proximate cause is established when defendant's misconduct was a "substantial factor in the sequence of responsible causation, and if the injury is reasonably foreseeable or anticipated as a natural consequence");

*In re EDC*, 930 F.2d 1255, 1279 (7th Cir. 1991) (purchaser of corporation has RICO standing to sue for fraud on corporation: "the creditors have standing to complain about the alleged fraud even though they were not the primary victims — the [PBGC] was");

*Taffet v. Southern Co.*, 930 F.2d 847, 856-57 (11th Cir. 1991), *vacated*, 958 F.2d 1514 (11th Cir. 1992) (utility customers have standing to sue utilities who defrauded rate regulators who in turn increased utility rates) (cited favorably in *Holmes*, 503 U.S. at 272 n.19);

*County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311-12 (2d Cir. 1990) (RICO) (same) (cited favorably in *Holmes*, 503 U.S. at 272 n.19);

*Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1101 (2d Cir. 1988) (defendant who defrauded corporation could be sued in RICO by corporate creditor) (cited favorably in *Holmes*, 503 U.S. at 272 n.19);

*Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1066-67 (3d Cir.1988) (plaintiff had antitrust and RICO standing to sue defendant who bribed a buyer, which in turn caused plaintiff to lose bid), *aff'd*, 493 U.S. 400 (1990).

insisted that "[t]he Funds may still bring a subrogation action to recover the medical costs paid out for the individual smokers, and the smokers themselves have sufficient independent incentive to pursue their own causes of action for such additional types of injuries as pain and suffering." App. 20a.

The possibility of state-law personal injury claims is irrelevant. RICO claims belonging to one plaintiff cannot be preempted by state-law claims belonging to another plaintiff. State tort law is focused on different wrongs with different elements. RICO was designed to provide a federal cause of action even when a state-law claim might exist (indeed, RICO incorporates numerous state-law offenses as predicate acts), and Congress expressly allowed overlap between RICO and state law remedies. *See* 84 Stat. 947 (1970) (§ 904(b), P.L. 91-452) ("Nothing in...[RICO] shall supersede any provision of Federal, State, or other law imposing criminal penalty or affording civil remedies in addition to those provided...[by RICO].").

Thus, this Court has considered damages "duplicative" only if one plaintiff's RICO claim overlapped the *same* RICO claim brought by another plaintiff. *No decision of this Court has ever dismissed a claim as too indirect without identifying a more directly injured party who could sue to remedy the same RICO violation.* This Court has always stressed the need "that at least some party have sufficient incentive to bring suit." *California v. ARC America Corp.*, 490 U.S. 93, 103 n. 6 (1989). *Accord Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U.S. 143, 151 (1987) (RICO designed to encourage "private attorneys general [for] a serious national problem for which public prosecutorial resources are deemed inadequate"); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 241 (1987) ("vigorous incentives for plaintiffs to pursue RICO claims"); *Sedima, SPRL v. Imrex Co., Inc.*, 473 U.S. 479, 493 (1985) ("private attorney general provision . . . designed to fill prosecutive gaps" (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (antitrust)).

Accordingly, before denying standing to an indirect party under RICO, this Court has inquired whether "the general interest in deterring injurious conduct" otherwise will be served by some more "directly injured victims [who] can generally be counted on to vindicate the law as private attorneys general." *Holmes*, 503 U.S. at 269. Moreover, this Court has opined that it will not deny standing when that is "likely to leave a significant antitrust violation undetected or unremedied." *AGC*, 459 U.S. at 542. The Second Circuit's decision flies in the face of this principle.

**3.** ***No Duplicative Damages or Apportionment Problem Exists.*** In contrast to the Third Circuit, the Second Circuit claimed that duplicative damages and apportionment would pose an obstacle to the Health Trusts' suit: Although "the smokers in this case do not present a risk of double recovery under RICO," "other remote payors like the employers or health insurers with whom the Funds may contract might bring suit claiming that they ultimately bore the costs. . . . Thus, a possibility of duplicative recoveries exists." App. 19a.

But this risk is concocted. As the Second Circuit itself suggested, the single satisfaction rule would prohibit duplicative recoveries by multiple plaintiffs against a single defendant. App. 19a. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971) (antitrust); *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 599-601 (2d Cir. 1989) (RICO); *Morley v. Cohen*, 888 F.2d 1006, 1012-13 (4th Cir. 1989) (RICO, citing antitrust and tort cases); *Texas v. American Tobacco Co.*, 14 F. Supp.2d 956, 967-68 (E.D. Tex. 1997) (no risk of multiple recovery in suit by state for Medicaid expenses). Moreover, the risk cannot justify barring suit by the Health Trusts as the most directly affected party which itself paid the medical costs in question. If employers or more distant plaintiffs brought suit, the *Holmes* proximate cause factors could perhaps be used to bar *those* lawsuits, because the Trusts are more directly injured and can be counted on to vindicate the law under RICO. Clearly, the Second Circuit did not think this supposed threat of duplication was a real obstacle, for if duplication ex-

isted, it would also apply to the Funds' subrogation claims, which the court held *could* be brought. App. 20a.

**4. *Indirectness Does Not Make It "More Difficult" to Ascertain Damages*.** The Second Circuit held that the Health Trusts' damages claims were "incredibly speculative" because they involved allegations about what the funds and smokers would have done in the absence of fraud. App. 17a. In so holding, the court of appeals fundamentally misconceived the proper inquiry established by this Court.

The test is not whether a damages claim is difficult or hard to prove in the abstract. Rather, the test is whether indirectness makes it "*more* difficult" to ascertain damages than if a more directly injured party sued. *Holmes*, 503 U.S. at 269 (emphasis added). The concern about relative difficulty of proof presupposes that a more direct party with more ascertainable damages could bring the same claim. If one does exist, statutory enforcement would be enhanced by giving that party standing because it will avoid the additional "problems attendant upon suits by plaintiffs injured more remotely." *Holmes*, 503 U.S. at 269. Once again, the point is to *aid* statutory enforcement by giving the claim to the plaintiff who will face the fewest problems with causal proof, not to block enforcement.

But the Health Trusts are the only possible plaintiffs for the claims in question. There is no other, more directly injured party who could sue. Thus, the relative judgment commanded by this Court — *which* plaintiff has the more easily ascertainable damages?— cannot be used to disqualify the Health Trusts' suit.

The court of appeals fallaciously stressed the causal complications of determining the effect of smoking cessation programs or whether, absent the defendants' misconduct, smokers would have stopped smoking or smoked safer cigarettes, and how much in medical costs would have been saved as a result. App. 17a-18a. But the court was in no position to determine whether the evidence would be too speculative. No discovery has been taken in this case. No evidence has been introduced. Those courts that have actually tried tobacco cases — in Flor-

ida, Minnesota, Washington, and Ohio — have concluded that the plaintiffs did have acceptable damages models.

More fundamentally, the causal complications noted by the Second Circuit are not unique to suits by health care payors. The *same* supposed complications arising from "fraudulently induced inaction" would apply to a personal injury product liability suit by individual smokers, or to a subrogation action by the Health Trusts, whom the court conceded *could* meet the proximate cause test. App. 20a. Indeed, the ability of the Health Trusts to proceed on aggregated statistical proof, rather than individuated proof, *decreases* the causal complications. "In a large population, random variations tend to cancel each other out, yielding an overall observed distribution that is far more useful in evaluating correlations, relationships and probabilities." *Allen v. United States*, 588 F. Supp. 247, 417 (D. Utah 1984), *rev'd on other grounds*, 816 F.2d 1417 (10th Cir. 1987).

### B. The Decision Below Conflicts With Other Lower Court Decisions.

Review is warranted because of the deep divergence among the lower courts regarding the proper application of the *Holmes* and *AGC* factors.

1. ***State tobacco litigation.*** The Second Circuit's decision conflicts with numerous decisions in the states' litigation against the tobacco industry. Out of more than 40 state suits brought against the cigarette makers on similar legal theories and causal chains, all but one (Indiana) was sustained despite identical arguments that proximate cause was lacking because the injury was too remote or indirect. Twenty-three of the twenty-four courts in which tobacco companies moved to dismiss the states' actions sustained part or all of the complaints. Some of these rulings rested on special state statutes, but many did not and explicitly found the causal chain sufficiently proximate. For example, the court in *Texas v. American Tobacco*, 14 F. Supp.2d 956 (E.D. Tex. 1997), rejected a remote-

ness claim under *Holmes*, holding that "[w]ith respect to multiple recovery there can be none in this type of action. . . . [T]here can be no better party to prosecute this matter." *Id.* at 968. "With respect to the difficulty in determining damages, . . . difficulty in and of itself does not bar this action. . . . [T]he basic damage allegations provided thus far in the litigation counsel against a finding that this plaintiff is too remote. The State will attempt at trial to prove damages through the use of statistical evidence presented by way of a 'damage model.' In general, the use of such evidence has been deemed permissible in this type of action." *Id.* In *McGraw v. American Tobacco*, No. 94-C-1707, slip op. at 6 (W. Va. 13th Cir. Feb. 13, 1997), the court refused to dismiss an antitrust claim, explaining: "This Court finds the opinion of *McCready* helpful. When one looks at the facts outlined in that opinion together with the allegations in the complaint, this Court finds dismissal unwarranted and improper." Similarly, the Supreme Court of Minnesota held that Blue Cross and the State of Minnesota had standing to sue the tobacco defendants for antitrust violations and other claims. *Minnesota v. Philip Morris*, 551 N.W.2d 490, 496-97 (Minn. 1996). Although the Minnesota antitrust statute is in some respects broader than its federal counterpart, the court explained that it would have found standing, even for Blue Cross, "[e]ven absent the statutory grant of authority in the antitrust statute." *Id.* at 497 n.1. And a Washington court held that the state would have antitrust standing even without a special statute because dismissal of the claim would leave "an antitrust wrong without a remedy." *Washington v. American Tobacco Co.*, 1996 WL 931316, at *5 (Wash. Super. Ct. 1996).[6]

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[6] *See also Alaska v. Philip Morris*, No. 1JU-97-915CI, at 3-4 (1st Jud. Dist. Oct. 9, 1998); *Arizona v. American Tobacco*, No. CV-96-14796, slip op. at 1-3 (Super. Ct. Maricopa Co. May 27, 1997); *Illinois v. Philip Morris*, No. 96L 13146, slip op. at 8-11 (Ill. Cir. Ct. Nov. 13, 1997); *Oregon v. Philip Morris*, No. 9706-04457, slip op. at 4 (Ore. Cir. Ct. Mar. 4, 1998).

**2.** ***Suits by other health care payors.*** Many courts in cases brought by private health care payors have sustained federal RICO claims in the face of the same remoteness challenges. For example, in *Blue Cross & Blue Shield of New Jersey v. Philip Morris*, 36 F. Supp.2d 560 (E.D.N.Y. 1999), *recon. denied*, No. 98 CV 1492 (E.D.N.Y. Aug. 2, 1999), Judge Weinstein held that "an analysis of all three [*Holmes*] factors supports the plaintiffs' argument that their injuries were proximately caused by the defendants' pattern of racketeering." *Id.* at 575.

In *National Asbestos Workers Medical Fund v. Philip Morris*, 23 F. Supp.2d 321, 323 (E.D.N.Y. 1998), *recon. denied*, No. 98 CV 3287 (E.D.N.Y. Aug. 2, 1999), Judge Weinstein similarly denied a motion to dismiss on proximate cause and other grounds because "the plaintiffs' claims and defendants' defenses should not be decided in the abstract, but in the context of specific facts which must be developed in the record." He added that the plaintiff's claims "would materially advance the statute's legislative purposes of deterring racketeering, in all its forms, and of remedying, as fully as practicable, the economic consequences of racketeering." *National Asbestos Workers Medical Fund v. Philip Morris*, No. 98 CV 1492, mem. op. at 21 (E.D.N.Y. Sept. 7, 1999).

In *Arkansas Blue Cross & Blue Shield v. Philip Morris*, 47 F. Supp.2d 936 (N.D. Ill. 1999), the court denied the tobacco companies' motion to dismiss a health insurer's claim under *Holmes*. The district court observed that the health insurer was suing for its "own economic injury," not any "derivative" injury. *Id.* at 938. With respect to the measurement of damages, the court concluded that "plaintiffs may well be able to bring reliable statistical and expert evidence to show the percentage of damage caused by defendants' actions." *Id.* at 939. The court also held that there was no danger of duplicative damages or complex apportionment: "the damages claimed in this case are separate from the damages suffered by smokers. Plaintiffs 'seek recovery only for the economic burden of those medical claims and procedures which they directly paid as a result of

tobacco use.'" *Id.* "[I]n the present cases Blue Cross is the best, and under some case law perhaps the only, plaintiff who can bring this claim because no other potential plaintiff can claim economic injury." *Id.* Subsequently, the defendants moved for reconsideration, citing the Second Circuit's decision in this case. The district court denied reconsideration, explaining it did not believe "that a motion to dismiss is the time to decide that plaintiffs will not be allowed to present their proof," that the court did "not think there is likely to be much difficulty in apportioning damages," and that it disagreed "that plaintiffs are likely to be reimbursed by smokers actions against defendants." *Arkansas Blue Cross & Blue Shield v. Philip Morris*, No. 98-C-2612, slip op. (N.D. Ill. Aug. 2, 1999). Nonetheless, the court stated that it "could not reconcile" the Second Circuit's decision in this case with governing Seventh Circuit precedent and certified the case to the Seventh Circuit under 28 U.S.C. § 1292(b) on the proximate cause question.

In *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris*, 23 F. Supp.2d 771 (N.D. Ohio 1998), the court denied the defendants' motion to dismiss a union health care trust fund case on remoteness grounds. The court held that, "[h]aving found that proving the plaintiffs' damages flowed from defendants' RICO violation is not unduly difficult, and having found there is little risk of double recovery for defendants purported RICO violations, and having found that, if proven, defendants conduct is sufficiently injurious to warrant deterrence, the factors described in *Holmes* suggest this Court not dismiss plaintiffs' RICO counts on standing or proximate cause grounds." *Id.* at 786.[7]

In *Utah Laborers' Health & Welfare Trust Fund v. Philip Morris*, No. 2:98 CV 403B (D. Utah Mar. 31, 1999), the court denied a motion to dismiss the claims of union health care trust

[7] The defendants later prevailed at a trial on the merits in *Iron Workers*, and a notice of appeal from the defense verdict has been filed.

funds on remoteness grounds.[8] In *Kentucky Laborers District Council Health & Welfare Trust Fund v. Hill & Knowlton, Inc.*, 24 F. Supp.2d 755, 770 (W.D. Ky. 1998), the court found RICO standing for allegations that the defendants' misrepresentations "prevented the Funds from pursuing proactive measures such as smoking cessation programs and other educational efforts to reduce smoking among the Participants."

State courts also have rejected the Second Circuit's approach to proximate cause. In *Steamfitters Local Union No. 614 Health Fund v. Philip Morris*, No. 92260-2, slip op. (Tenn. Cir. Ct. Jan. 29, 1999), for example, the court denied a motion to dismiss a union health fund's state-law suit on proximate cause grounds, opining that "proximate cause is always to be determined upon the facts of each case." *Id.* at 6.[9] A California state court recently denied a motion to dismiss on remoteness grounds state-law actions by union health and welfare funds. *In re Tobacco Cases II*, JCCP 4042 (San Diego Super. Ct. July 14, 1999). The case is scheduled to go to trial in June 2000.

Review should be granted because the Second Circuit's "directness" rule conflicts with all of these cases.

## II. This Court Should Grant Review on the Question of Whether the *Holmes* Factors Apply to Claims for Injunctive Relief Under RICO

This case presents the separate question whether the *Holmes* factors applicable to requests for damages also apply to claims seeking injunctive relief under RICO. In *Cargill v. Monfort of Colorado*, 479 U.S. 104, 111 n.6 (1986), this Court held that the *Holmes* factors do not apply to injunctive claims under the

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[8] The plaintiff subsequently agreed to the defendants' motion for an interlocutory appeal under 28 U.S.C. § 1292(b). *See also West Virginia Laborers' Fund v. Phillip Morris*, No. Civ. 3:97-0708 (S.D.W.Va. Aug. 12, 1998), *later voluntarily dismissed* (similarly rejecting remoteness objection).

[9] Plaintiff subsequently agreed to defendants' motion for an interlocutory appeal.

antitrust laws, and precisely the same reasoning extends to RICO:

> [T]he difference in the remedy each section provides means that certain considerations relevant to a determination of standing under § 4 [the damages statute] are not relevant under § 16 [the injunction provision]. The treble-damages remedy, if afforded to "every person tangentially affected by an antitrust violation," . . . would "open the door to duplicative recoveries," and to multiple lawsuits. In order to protect against multiple lawsuits and duplicative recoveries, courts should examine other factors . . . such as the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed, to determine whether a party is a proper plaintiff under § 4. Conversely, under § 16, the only remedy available is equitable in nature, and . . . "the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one." Thus, because standing under § 16 raises no threat of multiple lawsuits or duplicative recoveries, some of the factors other than antitrust injury that are appropriate to a determination of standing under § 4 are not relevant under § 16.

*Id.* (citations omitted). Thus, claims for injunctive relief present no danger of duplicative recoveries or difficult apportionment of damages. There can be no concern about speculative damages because claims for injunctive relief require no calculation of damages.

The Second Circuit's judgment flies in the face of *Cargill* and conflicts with numerous other decisions in the lower courts. *See, e.g.*, *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1172 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 865 (1999) ("The concerns of the direct purchaser rule have mainly to do with the complexities of incidence analysis, complexities that

do not arise when the courts must consider the propriety of injunctive relief."); *McCarthy v. Recordex Serv.*, 80 F.3d 842, 856 (3d Cir.), *cert. denied*, 519 U.S. 825 (1996) ("[I]n contrast to the treble damage action, a claim for injunctive relief does not present the countervailing considerations — such as the risk of duplicative or ruinous recoveries and the spectre of a trial burdened with complex and conjectural economic analyses — that the Supreme Court emphasized when limiting the availability of treble damages.") (internal quotation omitted); *Sundance Land Corp. v. Community First Fed. S&L Assn.*, 840 F.2d 653, 661 (9th Cir. 1988) ("Parties who cannot recover damages may nevertheless obtain injunctive relief. . . . The fact that more than one party has standing to obtain the same injunction poses no undue difficulties for the court or the defendant. Accordingly, when injunctive relief is sought, it does not matter that there are other parties who may have been more directly injured."); *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1167 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980) ("An injunctive suit does not expose a defendant to monetary liability at all, much less to the risk of duplicative liability, and does not require the trier of fact to determine the incidence of the overcharge."); *HTI Health Servs. v. Quorum Health Group*, 960 F. Supp. 1104, 1111 n.3 (S.D. Miss. 1997) ("The Supreme Court, however, has distinguished the standing analysis for injunctive relief under Section 16 by explaining that some of the factors (other than antitrust injury) that are appropriate to a determination of standing in an action for damages are not relevant in an action for injunctive relief. Such irrelevant factors would include the threat of multiple lawsuits or duplicative recoveries."). *See also* Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW ¶ 371d, at 259 (1995) ("An equity suit neither threatens duplicative recoveries nor requires complex tracing through the distribution chain. There are no damages to be traced, and a defendant can comply with several identical injunctions as readily as with one.").

Even the Ninth Circuit, in dismissing the claim for injunctive relief in *Oregon Laborers-Employers Health & Welfare*

*Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999), cert. pending, No. 99-642, acknowledged that "[s]tanding analysis for equitable relief under the antitrust laws is not the same as standing analysis for damages." 185 F.3d at 966. The Ninth Circuit dismissed the claim for RICO equitable relief on the sole (and unsupportable) ground that such relief is not available to private plaintiffs.

The Second Circuit's judgment conflicts with all of these decisions.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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November 4, 1999

**APPENDIX A**

LABORERS LOCAL 17 HEALTH AND BENEFIT FUND; TRANSPORT WORKERS UNION NEW YORK CITY PRIVATE BUS LINES HEALTH BENEFIT TRUST, on behalf of themselves and all others similarly situated; UNITED FEDERATION OF TEACHERS WELFARE FUND; COMMUNICATIONS WORKERS OF AMERICA LOCAL 1180 SECURITY BENEFITS FUND; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 891 WELFARE FUND and SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 WELFARE FUND, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

PHILIP MORRIS, INC.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION, USA; B.A.T. INDUSTRIES, P.L.C.; LORILLARD TOBACCO CO.; LIGGETT & MYERS, INC.; AMERICAN TOBACCO COMPANY; UNITED STATES TOBACCO COMPANY; COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC.; TOBACCO INSTITUTE, INC.; SMOKELESS TOBACCO COUNCIL, INC. and HILL & KNOWLTON, INC.,

Defendants-Appellants.

Docket No. 98-7944

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

February 4, 1999, Argued
April 9, 1999, Decided
As Amended August 18, 1999.

Before: CARDAMONE, CABRANES, and STRAUB Circuit Judges.

CARDAMONE, Circuit Judge:

Plaintiffs Laborers Local 17 Health & Benefit Fund and the Transport Workers Union New York City Private Bus Lines Health Benefit Trust are labor union health and welfare trust funds established pursuant to the Taft-Hartley Act and the Employee Retirement Income Security Act, 29 U.S.C. §§ 1002(1), 1002(3), 1003(a) (1994) (ERISA), for the purpose of supplementing employees' basic medical benefits by providing death, disability, and related services.

Plaintiffs United Federation of Teachers Welfare Fund, Communications Workers of America Local 1180 Security Benefits Fund, International Union of Operating Engineers Local 891 Welfare Fund, and Social Service Employees Union Local 371 Welfare Fund are not-for-profit trusts which were established to supplement public-sector employees' basic medical benefits. We refer to all of the plaintiffs collectively as plaintiffs or Funds.[1]

The Funds brought suit on June 19, 1997 in the United States District Court for the Southern District of New York (Scheindlin, J.) alleging that defendants, major tobacco companies[2] and their agents (defendants, tobacco companies, or appellants), had en-

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[1] The ERISA funds and the non-ERISA funds filed separate but substantially similar complaints that the district court considered together as related. For simplicity's sake, except where otherwise noted, when discussing the plaintiffs' allegations in both cases we follow the convention adopted by the district court of referring to the Laborers Local complaint.

[2] The defendants are: Philip Morris, Inc.; R.J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation, USA; B.A.T. Industries, P.L.C.; Lorillard Tobacco Co.; United States Tobacco Company; The Tobacco Institute, a public relations agent of the tobacco companies; The Council for Tobacco Research; Smokeless Tobacco Council, Inc.; and Hill & Knowlton, Inc., a public relations firm.

gaged in a conspiracy to deceive the general public, and to deceive plaintiffs specifically, with respect to the health risks associated with smoking, in order to shift the health-related costs of smoking to plaintiff Funds.

Defendants moved to dismiss the complaint for failure to state a claim, which the district court denied in part in an opinion and order dated March 25, 1998. See Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 7 F. Supp. 2d 277 (S.D.N.Y. 1998) (Laborers Local 17). After obtaining certification from the district court pursuant to 28 U.S.C. § 1292(b), defendants took an interlocutory appeal to this Court.

## BACKGROUND

### A. Plaintiffs' Complaint

Plaintiffs' complaint sets forth the following factual allegations, which we assume, for purposes of the motion to dismiss, are true. Over the past several decades, in response to medical indictments of smoking, the defendant tobacco companies engaged in an advertising campaign designed to mislead the public, and plaintiffs specifically, as to the true extent of the dangers that smoking poses to good health. Defendants actively concealed information that would have demonstrated the actual health risks, the addictiveness of nicotine, the effectiveness of various treatments for smoking addiction, and defendants' own ability to manufacture less addictive products. Moreover, plaintiffs and plan participants had no knowledge -- until very recently -- of defendants' wrongdoing. As a result, thousands of participants in plaintiffs' health care Funds became ill and/or died from smoking cigarettes produced and sold by defendant tobacco companies. Plaintiffs spent tens of millions of dollars to provide medical services for participants suffering from cigarette smoking-related diseases.

On the basis of these allegations, plaintiffs' complaint asserts ten causes of action (I to X) and seeks both monetary damages and injunctive relief requiring defendants to take appropriate corrective action. Specifically, the complaint seeks past and future damages to recover for "money expended . . . to provide medical treatment to [plaintiffs'] participants and beneficiaries who have suffered and are suffering from tobacco-related illnesses." As interpreted by the district court, the complaint also seeks damages inflicted on the Funds' infrastructure independent of the harm suffered by plan participants. These latter damages, alleged to be separate and wholly distinct from participants' medical costs, consist of losses suffered due to the Funds' inability to control costs, to promote the use of safer alternative products, and to establish programs to educate their participants not to use tobacco products.

Ordinarily, plaintiffs' right to sue for damages would be subrogated to the rights of those individual smokers for whom they provided health care benefits. In other words, plaintiffs would stand in the shoes of the injured participants and recoup damages from defendants, as tortfeasors, only to the extent defendants were liable to the participants themselves. But the Funds have not asserted such a subrogation action in this complaint. Instead, they have sued in their own right for the money spent for plan participants and, in addition, for injuries and damages they insist were separate from the injuries to plan participants and that harmed plaintiffs, the welfare benefit funds themselves.

**B. Prior Proceedings**

In January 1998 defendants moved to dismiss the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). In an order and opinion dated March 25, 1998 and entered the following day, the district court granted defendants' motion to dismiss in part, and denied it, in part. The court granted the motion to dismiss with respect to causes of action III and IV (antitrust) and X (unjust enrichment), and it also dismissed, without prejudice

and with plaintiffs' consent, the following causes of action: VII (strict liability), VIII (negligence), and IX (breach of express and implied warranties). See generally Laborers Local 17, 7 F. Supp. 2d at 294. That ruling left four causes of action remaining: the federal RICO claims (I & II); the state common-law claim of fraud, misrepresentation, and concealment (V); and the state common-law claim of assumption and breach of a special duty (VI).

In denying defendants' motion to dismiss with respect to these latter causes of action, the district court found proximate causation linking plaintiffs' injuries to defendants' asserted unlawful conduct, and thus concluded not only that the Funds had standing to assert a RICO cause of action but also that they stated a prima facie case with respect to the state common law claims. It held that a rational trier of fact could find that defendants' alleged wrongdoing proximately caused plaintiffs' alleged injuries, reasoning that the injuries were arguably (a) foreseeable and (b) not too remote as a matter of law, in light of the policy factors articulated in Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 269-70, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992). The district court also determined that the possible availability of a subrogation remedy was no bar to the maintenance of the RICO, fraud, and breach of special duty claims. The district court ruled, in addition, that these causes of action had not been preempted by the federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340 (1994).

Defendants then sought interlocutory appeal of those portions of the order denying their Rule 12(b)(6) motion to dismiss. When requested by defendants to certify the order for interlocutory review under 28 U.S.C. § 1292(b) (1994), the district court declined to certify all of the issues defendants had raised. Instead, the court limited certification to the following two questions.

> Whether, under the circumstances alleged in plaintiffs' complaint, economic injuries incurred by a union health care trust fund are purely derivative of the physical injuries which its participants suffered, and are therefore too remote to permit recovery as a matter of law.
>
> Whether the Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-40 (1994), preempts plaintiffs' state law fraud and breach of special duty claims.

Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 7 F. Supp. 2d 294, 296-97 (S.D.N.Y. 1998). On July 14, 1998 we granted leave to appeal these certified questions pursuant to § 1292(b), and now reverse.

## DISCUSSION

On appeal of a motion to dismiss, we accept all of the allegations in plaintiffs' complaint as true. See Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984). Dismissal is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Id.

### Proximate Cause

The first certified question we are called upon to answer raises a question of proximate cause, namely, whether the chain of causation linking defendants' alleged wrongdoing to plaintiffs' alleged injuries is too remote to permit recovery as a matter of law. We begin by analyzing this subject in the context of plaintiffs' RICO claims.

## I. Proximate Cause as an Element of Standing Under RICO

The RICO provision for civil actions states.

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c) (1994). In Holmes, 503 U.S. at 268, the Supreme Court stated that a plaintiff's standing to sue under RICO requires "a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." To determine in a given case whether proximate cause is present, common law principles are applied. See id. at 267-68 (explaining that statutory standing under RICO encompasses common law principles of proximate cause because Congress implicitly incorporated those principles into the RICO statute) (citing Associated Gen. Contractors, Inc. v. Carpenters, 459 U.S. 519, 532-33, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983) (AGC) (plaintiff unions barred from bringing antitrust suit to challenge allegedly coerced business relationship of third parties with nonunion firms).[3]

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[3] We have previously stated that, in a suit on a statute, it may be preferable to speak not in terms of causation, but rather in terms of whether the plaintiff is within the class the statute sought to protect and whether the harm done was one the statute sought to prevent. See Abrahams v. Young & Rubicam Inc., 79 F.3d 234, 237 (2d Cir. 1996). Nevertheless, we have chosen in this case to use the same "proximate cause" terminology that the Supreme Court employed in Holmes, which involved an aspect of statutory standing that is closely analogous to the issue presented here. To avoid

## A. The Concept In General

Any discussion of proximate cause should be approached with some trepidation because, as a scholarly treatise teaches, no topic is subject to more disagreement or such confusion. Proximate cause is an elusive concept, one "always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent." W. Page Keeton et al., Prosser & Keeton on The Law of Torts, § 42, at 279 (5th ed. 1984) (quoting 1 Street, Foundations of Legal Liability, 110 (1906)). In everyday terms, the concept might be explained as follows: Because the consequences of an act go endlessly forward in time and its causes stretch back to the dawn of human history, proximate cause is used essentially as a legal tool for limiting a wrongdoer's liability only to those harms that have a reasonable connection to his actions. The law has wisely determined that it is futile to trace the consequences of a wrongdoer's actions to their ultimate end, if end there is.

The notion of limiting liability is well-accepted; it is its application to a given case that is more troublesome. The dictionary definition of the word "proximate" provides little assistance in this regard, limited as it is to such broad synonyms as "very near, immediately, adjoining, close." Webster's Third New International Dictionary 1828 (1981).

## B. Direct Injury as a Requirement of Proximate Cause

Over the passage of time, however, courts have somewhat clarified the definition of proximate cause by identifying several traditional common law principles limiting liability whose application, in aggregate, formulates the proximate cause analysis. As noted in Holmes, "'proximate cause' [is used] to label generi-

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confusion in other cases, we re-emphasize that, depending on the statute, the existence of common-law proximate causation is neither always necessary, nor always sufficient, to meet the requirement of statutory standing. See Abrahams, 79 F.3d at 237 n.3.

cally the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." 503 U.S. at 268; see also AGC, 459 U.S. at 532-33, 537-38 (conducting a proximate cause analysis by looking at a "number of . . . controlling" factors).

Among these "judicial tools," one notion traditionally included in the concept of proximate causation is the requirement that there be "some direct relation between the injury asserted and the injurious conduct alleged." Holmes, 503 U.S. at 268. For this reason, "a plaintiff who complains of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." Id. at 268-69 (citing 1 J.G. Sutherland, A Treatise on the Law of Damages 55-56 (1883)); see also AGC, 459 U.S. at 532-33 & n.25; Anthony v. Slaid, 52 Mass. (11 Met.) 290 (1846).

Holmes emphasized that although the direct injury test "is not the sole requirement of [proximate] causation, it has been one of its central elements." 503 U.S. at 269 (citing AGC, 459 U.S. at 540). This language tells us that to plead a direct injury is a key element for establishing proximate causation, independent of and in addition to other traditional elements of proximate cause. Thus, the other traditional rules requiring that defendant's acts were a substantial cause of the injury, and that plaintiff's injury was reasonably foreseeable, are additional elements, not substitutes for alleging (and ultimately, showing) a direct injury.

We also have had occasion to observe that foreseeability and direct injury (or remoteness) are distinct concepts, both of which must generally be established by a plaintiff. For example, in Kinsman Transit Co. v. City of Buffalo, 388 F.2d 821, 824-25 & n.8 (2d Cir. 1968), defendant's ship broke loose, crashing into and collapsing a bridge, such that the debris disrupted river traffic and caused damage to plaintiffs' businesses that depended on that traffic. We ruled that even though plaintiffs' injuries were

foreseeable, the damages incurred were too remote to permit recovery.

Proximate cause was lacking because those injuries were not "direct" but "occurred only because the downed bridge made it impossible to move traffic along the river"; in other words, the injuries were merely indirect and therefore too remote as a matter of law, since they were wholly derivative of an injury to the property of a third party, the bridge owner. Id. at 825; see also Dundee Cement Co. v. Chemical Labs., Inc., 712 F.2d 1166, 1168 (7th Cir. 1983) (regardless of foreseeability, plaintiff had no standing because damages derived solely as a result of injury to the person or property of another).

Although plaintiffs attempt to read our case law subsequent to Kinsman to permit recovery for indirect injuries so long as those injuries are foreseeable, those decisions, which we discuss in section II B., do not sustain such a reading since they dealt with direct, not indirect, injuries. Moreover, in light of the discussion of case law above, substituting the foreseeability test, in place of finding the existence of a direct injury, is error. As a general rule, proximate cause requires that both be present.

Plaintiffs further contend that because they assertedly meet another traditional test required for statutory torts, namely, the zone of interests test, they need not also meet the direct injury test in order to show proximate cause. Yet the zone of interests test assertedly met by plaintiffs is an inquiry "into whether, apart from the directness of the injury, the plaintiff is within the class of persons sought to be benefited by the provision at issue." Holmes, 503 U.S. at 287 (Scalia, J., concurring) (emphasis added); see also id. at 287 n. * (explaining that the zone of interests test should be viewed as an additional requirement for statutory torts, separate from the common law principles of proximate cause generally applicable to both statutory and non statutory torts). Like the foreseeability test, such an inquiry is distinct from the direct injury test and, accordingly, may not be

substituted for the direct injury test in order to establish standing under RICO. See id. at 287.

## II. The Direct Injury Test: Explanation and Application

As Justice Holmes writing for the Court observed in Southern Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533, 62 L. Ed. 451, 38 S. Ct. 186 (1918), "the general tendency of the law, in regard to damages at least, is not to go beyond the first step." Accord Holmes, 503 U.S. at 271-72 (quoting AGC, 459 U.S. at 534). For that reason, where a plaintiff complains of injuries that are wholly derivative of harm to a third party, plaintiff's injuries are generally deemed indirect and as a consequence too remote, as a matter of law, to support recovery. See Holmes, 503 U.S. at 268-69. At the same time, the Supreme Court noted the impossibility of articulating a black-letter rule capable of dictating a result in every case. See id. at 272 n.20. Accordingly, it identified three policy factors to guide courts in their application of the general principle that plaintiffs with indirect injuries lack standing to sue under RICO. See id. at 269-70. First, the more indirect an injury is, the more difficult it becomes to determine the amount of plaintiff's damages attributable to the wrongdoing as opposed to other, independent factors. Second, recognizing claims by the indirectly injured would require courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, in order to avoid the risk of multiple recoveries. Third, struggling with the first two problems is unnecessary where there are directly injured parties who can remedy the harm without these attendant problems. See Holmes, 503 U.S. at 269-70.

### A. Examples of Indirect Injury

In order to illustrate the difference between direct and indirect injuries, we review several cases on the subject. First, we examine cases where the injuries were indirect.

In Holmes, plaintiff Securities Investor Protection Corp. (SIPC) insured brokers, such that when a broker went bankrupt, SIPC was obligated by statute to reimburse the broker's customers for certain claims not satisfied by the broker's liquidated assets. SIPC alleged that Robert Holmes had conspired in a stock manipulation scheme that led to the bankruptcy of two brokers, disabling them from meeting their obligations and, as a result, triggering SIPC's statutory duty to reimburse the customers. Asserting a subrogation claim that allowed SIPC to stand in the shoes of the brokers' customers, SIPC sued Holmes under RICO for amounts reimbursed to the customers because of the bankruptcies resulting from Holmes' alleged scheme.

The Supreme Court found the plaintiffs' injuries to be indirect, because their losses were purely contingent on the insolvency of third parties, the brokers, that had resulted from defendants' actions. See id. at 271. Hence, the Court ruled that the suit by SIPC against Holmes could not stand, because the harm to the customers was too remote, i.e., there was no proximate cause. See id.; see also Manson v. Stacescu, 11 F.3d 1127, 1130-31 (2d Cir. 1993) (creditors of bankrupt corporation lacked RICO standing to sue defendants who had caused bankruptcy).

Similarly, courts have held that plaintiffs who are obligated to pay the medical expenses of another may not recover against the tortfeasor who caused the damage, because their injuries are indirect since they derive wholly from the injuries sustained by the third party. This concept is not new. An 1883 treatise cited a case where A, who had agreed with a town to support for a specific time, and for a fixed sum, all the town paupers, in sickness and in health, was held to have no cause of action against S for assaulting and beating one of the paupers, whereby A was put to increased expense. The damage was held too remote and indirect.

1 J.G. Sutherland, A Treatise on the Law of Damages 55 (1883) (citing Anthony v. Slaid, 52 Mass. (11 Met.) at 291). And, citing a Connecticut case, the treatise goes on to say.

> An insurance company cannot recover from a wrongdoer, who causes the loss insured against, the money paid to satisfy such loss.

Id. at 56 (citing Connecticut Mut. Life Ins. Co. v. New York & New Haven R.R. Co., 25 Conn. 265 (1856)); see also Great Am. Ins. Co. v. United States, 575 F.2d 1031, 1033 & n.3 (2d Cir. 1978) (collecting cases) (insurer barred from suing tortfeasor directly, when tortfeasor damaged insured).

**B. Examples of Direct Injury**

In contrast, a direct injury has been found when the plaintiff's injuries are not derivative of damage to a third party. For instance, in Standardbred Owners Assoc. v. Roosevelt Raceway Assocs., 985 F.2d 102, 104 (2d Cir. 1993), the defendant corporation decided to close a racetrack it owned thereby injuring the plaintiffs, a group of horse owners, trainers, drivers, grooms, and similar persons who had invested in equipment and horses for use at the track in reliance on the corporation's oral assurances that the track would stay open. The adjoining municipality had financed the defendant corporation's acquisition of the racetrack so that the track, a valuable town asset, would continue to operate. Plaintiffs endured a direct injury from the closing because the injury did not derive from harm to a third person, where the plaintiffs' injuries flowed from their own investments in the racetrack and were not derivative of injuries to the local municipality's investments in the racetrack. Id. at 104.

In Ceribelli v. Elghanayan, 990 F.2d 62, 64 (2d Cir. 1993), we ruled that the plaintiffs could proceed with their RICO claims where the defendants' misrepresentations induced plaintiffs to purchase over-valued stock from the defendants in a cooperative

corporation. At the same time, we noted that standing to sue would have been "doubtful" had the plaintiffs simply alleged a diminution in the value of their shares resulting from harm to the corporation subsequent to the purchase. Id.

In Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1101 (2d Cir. 1988), a creditor brought a RICO action against the officers of the debtor corporation. The creditor had standing to bring its RICO claims only for "injuries it suffered directly." Id. These injuries included damages for defending against frivolous lawsuits initiated by the defendant officers directly against the creditor in an attempt to delay the debt collection as well as to increase the creditor's legal fees. See id. at 1099. Additionally, based upon fraudulent misrepresentations by the defendant officers that concealed the availability of a major asset, the plaintiff creditor agreed to a reorganization plan where it relinquished all but 17.5 percent of its allowed claim against the debtor corporation. Id. at 1098. This last injury was direct because it was not dependent upon any actual injury the debtor corporation may have suffered as a result of the concealment, but instead arose solely from the misrepresentation by the defendant officers to the plaintiff creditor about the status of the debtor's assets. See also Ceribelli, 990 F.2d at 63 (characterizing the injury in Bankers Trust as direct). Cf. Manson, 11 F.3d at 1130 (injury to creditors from actual diminution in debtor corporation's assets was indirect).

In GICC Capital Corp. v. Technology Finance Group, Inc., 30 F.3d 289, 290 (2d Cir. 1994), plaintiff accepted a promissory note from defendants as part of an unrelated settlement. During the negotiation of the terms and issuance of the note the defendants did not disclose that, at the same time they were agreeing to cause the corporation to issue the note, they were stripping it of assets, rendering it unable to meet that obligation. Id. at 292-93. The defendants' failure to disclose the stripped-down status of the corporation induced the plaintiff to accept the note in settlement. We stated that because of the timing and magni-

tude of the note, the plaintiffs had RICO standing. Id. at 293. In other words, if the plaintiffs had accepted a promissory note from a corporation that was at that time able to repay the note, and later the defendants stripped the corporation, the injury would have been indirect because it would have derived wholly from injuries to the corporation. But, when the promissory note was issued, the corporation had already been stripped of enough assets to undermine the possibility of repayment. Thus, because of the defendants' misrepresentations, the plaintiff in GICC (much like the plaintiffs in Cerebelli) accepted an over-valued asset, the note, in exchange for the settlement of their litigation claims. The injury was direct because the plaintiff was immediately injured in the process of negotiating the settlement contract with the defendants, rather than as a derivative result of later injuries to a third party namely, the corporation that issued the note.

As these cases demonstrate, the critical question posed by the direct injury test is whether the damages a plaintiff sustains are derivative of an injury to a third party. If so, then the injury is indirect; if not, it is direct.[4]

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[4] It bears noting again that, as the Supreme Court restated in Holmes, "the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case." 503 U.S. at 272 n.20. In addition, the term "indirect" may connote concepts -- such as remoteness in time or space -- other than "derivative," which itself cannot be defined with absolute precision. Accordingly, we follow the lead of the Holmes Court in making clear that, to the extent our description of "indirect" or "derivative" injury might seem to encompass cases where recovery by the plaintiff would not run afoul of the policy concerns set forth above, the outer limits of the direct injury test are described more by those concerns than by any bright-line, verbal definition. See id. ("Thus, our use of the term 'direct' should merely be understood as a reference to the proximate-cause inquiry that is informed by the concerns set out in the text.").

## C. Applying the Direct Injury Test to Instant Case

### 1. Parties' Contentions

The defendants' principal point on appeal is that the plaintiffs' damages are entirely derivative of the harm suffered by individual smokers as a result of defendants' acts. Hence, defendants believe that plaintiffs' alleged injuries are indirect, since they flow from the misfortunes visited upon third persons, and that plaintiffs therefore stand at too remote a distance to recover.

In response, plaintiffs declare that their complaint alleges a direct injury brought about by defendants' misconduct towards the Funds themselves. Plaintiffs allege that defendants misrepresented the health risks of smoking and the addictiveness of nicotine, causing the Funds to fail to implement smoking cessation programs, and deliberately shifting the costs of health care for tobacco related illnesses from the tobacco companies to the Funds. In turn, this led to what the district court termed "harm to [plaintiffs'] infrastructure, financial stability, [and] ability to project costs." Laborers Local 17, 7 F. Supp. 2d at 285. Plaintiffs insist that these injuries were direct, since the "activities of the Funds themselves were affected by defendants' misconduct."

Ultimately, however, whether plaintiffs' injuries are labeled as "infrastructure harm" or "harm to financial stability," their damages are entirely derivative of the harm suffered by plan participants as a result of using tobacco products. Without injury to the individual smokers, the Funds would not have incurred any increased costs in the form of the payment of benefits, nor would they have experienced the difficulties of cost prediction and control that constituted the crux of their infrastructure harms. Being purely contingent on harm to third parties, these injuries are indirect. Consequently, because defendants' alleged misconduct did not proximately cause the injuries alleged, plaintiffs lack standing to bring RICO claims against defendants.

2. Policy Considerations

Further, this conclusion is consistent with the three policy factors addressed by Holmes, which buttress the principle that plaintiffs with indirect injuries lack standing to sue under RICO. 503 U.S. at 269-70. "First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." Id. at 269 (citing AGC, 459 U.S. at 542-43). For instance, in Holmes, it was difficult to tell whether plaintiff's inability to collect from certain brokers had resulted from the defendants' conspiracy to manipulate the brokers or, instead, from the brokers' poor business practices. 503 U.S. at 273. The present case is similar because the damage claims here are incredibly speculative. It will be virtually impossible for plaintiffs to prove with any certainty: (1) the effect any smoking cessation programs or incentives would have had on the number of smokers among the plan beneficiaries; (2) the countereffect that the tobacco companies' direct fraud would have had on the smokers, despite the best efforts of the Funds; and (3) other reasons why individual smokers would continue smoking, even after having been informed of the dangers of smoking and having been offered smoking cessation programs. On a fundamental level, these difficulties of proving damages stem from the agency of the individual smokers in deciding whether, and how frequently, to smoke. In this light, the direct injury test can be seen as wisely limiting standing to sue to those situations where the chain of causation leading to damages is not complicated by the intervening agency of third parties (here, the smokers) from whom the plaintiffs' injuries derive.

These concerns become particularly pointed in a case, like the present one, where the injuries are alleged to derive not simply from defendants' affirmative misconduct but also from plaintiffs' fraudulently induced inaction. That is, it is often easier to ascertain the damages that flow from actual, affirmative conduct, than to speculate what damages arose from a party's failure to act. In

the latter situation, as in the case at hand, it becomes difficult to distinguish among the multitude of factors that might have affected the damages. Here, for example, plaintiffs' alleged damages might have derived from inefficiencies in the Funds' own management, as well as from non-smoking related health problems suffered by the smokers, and it would be the sheerest sort of speculation to determine how these damages might have been lessened had the Funds adopted the measures defendants allegedly induced them not to adopt.

The complexity of these calculations makes the ultimate question of damages suffered by the Funds virtually impossible to determine. Indeed, this case seems to present precisely the type of large, complicated damages claims that Holmes and Associated General Contractors sought to avoid. See, e.g., AGC, 459 U.S. at 545 ("Massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits."). Moreover, for us to rule otherwise could lead to a potential explosion in the scope of tort liability, which, while perhaps well-intentioned, is a subject best left to the legislature.

The second policy factor addressed in Holmes focuses on the possibility that "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." 503 U.S. at 269 (citing AGC, 459 U.S. at 543-44). Under New York law, the smokers are prohibited from recovering medical costs paid to them by insurers. New York law dictates that "where the plaintiff seeks to recover the cost of medical care" and the court finds that such costs were reimbursed by an insurance company, the court "shall reduce the amount of award by such a finding." N.Y. C.P.L.R. § 4545(c) (McKinney 1992). As a result, the district court believed the suit presented no risk of multiple recoveries. See Laborers Local 17, 7 F. Supp. 2d at 285.

Admittedly, the smokers in this case do not present a risk of double recovery under RICO. At the same time, however, other remote payors like the employers or health insurers with whom the Funds may contract might bring suit claiming that they ultimately bore the costs. Here, the Funds argue that ERISA prevents the employers from obtaining such a recovery. But the provision cited by plaintiffs merely prevents the assets of the Fund from inuring to the benefit of an employer. See 29 U.S.C. § 1103(c)(1) (1994). Although this might prevent recovery by an employer against the Fund, it in no way prevents a suit by the employer against the defendants as tortfeasors. Thus, a possibility of duplicative recoveries exists.

In this context, defendants assert that New York State has already sued some of the tobacco companies, seeking recovery of costs it has expended for the medical care of its employees, some of whom are participants in certain of the public-sector union Funds. But, the Funds respond, such duplicative recovery is prevented by the single satisfaction rule. The single satisfaction rule is often used to prevent a single plaintiff from recovering its damages several times over from multiple defendants. But, even were we to assume that the single satisfaction rule would prohibit duplicative recoveries by multiple plaintiffs against a single defendant, it would not cure the ultimate problem set forth in Holmes, that is, that courts would be forced to "adopt complicated rules apportioning damages among" the Funds, the employers, and perhaps even the unions, each of which is "removed at [a] different level[] of injury." Holmes, 503 U.S. at 269.

In the third policy factor discussed by Holmes, the Supreme Court concluded that the need to grapple with the problems of calculating and apportioning damages was unjustified where "directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." Id. (citing AGC, 459 U.S. at 541-42). The Funds correctly note that these RICO causes of action could not be asserted by the smok-

ers or by the Funds in a subrogation action because the RICO statute requires an injury to "business or property," whereas the smokers' injuries are personal in nature. Hence, the Funds conclude there are no more directly injured "private attorneys general" who could vindicate the law for these alleged RICO violations. The district court also found that because individual smokers would not be able to bring a RICO action, the harms alleged in plaintiffs' complaint would go unremedied were the Funds' action not allowed to continue.

Yet, to the contrary, our holding that plaintiffs lack standing under RICO need not bring about the result plaintiffs fear. The Funds may still bring a subrogation action to recover the medical costs paid out for the individual smokers, and the smokers themselves have sufficient independent incentive to pursue their own causes of action for such additional types of injuries a pain and suffering. Although these will not be RICO claims, they will remedy the harm done by defendants' alleged misconduct. Moreover, these actions will promote "the general interest in deterring injurious conduct," which Holmes noted as the objective of this policy factor. 503 U.S. at 269. Especially where such other actions are available, the lack of a RICO damages remedy for even direct personal injuries (such as those suffered by the individual smokers) actually weighs heavily against RICO standing for parties (such as the Funds) alleging harms that are purely contingent on personal injuries suffered by others.

In sum, the policy considerations highlighted in Holmes support our conclusion that the Funds have failed to establish proximate causation and that, accordingly, they lack standing to sue the defendants under RICO.

## III. Is a Defendant's Specific Intent to Harm a Plaintiff An Exception to the Direct-Injury Rule?

Plaintiffs aver that even if their claims fail the direct injury test, they should still have standing to sue because an exception

to this rule exists where the defendants specifically intend to harm plaintiffs. The complaint asserts that the tobacco companies intended to injure the Funds. The Funds urge that AGC -- a case that discusses the principles of proximate cause in the antitrust context and upon which Holmes heavily relied -- quotes a scholarly treatise to this effect, "'where the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote . . . unless the wrongful act is willful for that purpose.'" 459 U.S. at 532 n.25 (quoting 1 J.G. Sutherland, A Treatise on the Law of Damages 55-56 (1883)).

Yet, contrary to plaintiffs' argument, this view was specifically rejected in AGC. The Court there stated that "although buttressed by an allegation of intent to harm the [plaintiffs]" the complaint was "insufficient as a matter of law" for several reasons, including the fact that the plaintiffs alleged merely indirect injuries and were therefore barred from recovery as lacking proximate cause. 459 U.S. at 545. In addition, the Court observed that the availability of a remedy in that case was "'not a question of the specific intent of the conspirators.'" Id. at 537 (quoting Blue Shield v. McCready, 457 U.S. 465, 479, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)). The Ninth Circuit has also interpreted AGC to mean that "the existence of specific intent does not answer the question of whether the injury is specifically direct." Pillsbury, Madison & Sutro v. Lerner, 31 F.3d 924, 929 (9th Cir. 1994). Moreover, that court stated that "nothing in Holmes suggests that allegations of specific intent to cause RICO harm override the necessity to evaluate the directness of injury." Id.

In addition, the cases plaintiffs cite to support their argument are not persuasive, either because their discussion of intent is dicta or they involve a direct injury. See Chelsea Moving & Trucking Co. v. Ross Towboat Co., 280 Mass. 282, 286, 182 N.E. 477, 479 (1932) (noting in dicta that malice was not alleged in that case); Crab Orchard Improvement Co. v. Chesapeake & Ohio Ry. Co., 115 F.2d 277, 282-83 (4th Cir. 1940) (suggesting

in dicta that an employer may maintain a suit against a tortfeasor who injured an employee, if the tortfeasor intended to harm the employer in his contractual obligations); GICC, 30 F.3d at 292-93 (examining intent, but ultimately involving a direct injury, as discussed above); Manson, 11 F.3d at 1130 (noting that the defendants in Bankers Trust had acted for the "direct purpose" of harming the plaintiffs; however, Bankers Trust involved a direct injury, as discussed above).

As such, these decisions regarding specific intent do not support the proposition that an indirect injury is actionable where the injury was specifically intended by the defendant. In other words, an allegation of specific intent does not overcome the requirement that there must be a direct injury to maintain this action.[5]

## IV. Common Law Fraud and Special Duty Claims

Our inquiry into RICO standing began with the Supreme Court's holding in Holmes that the statute requires that at least the proximate causation principles found generally in the common law, including the direct injury requirement discussed above, be met. These principles also apply in general terms to the fraud and special duty causes of action asserted by plaintiffs under New York common law. See, e.g., Ferguson v. Green Island Contracting Corp., 36 N.Y.2d 742, 743, 368 N.Y.S.2d 163, 163, 328 N.E.2d 792 (1975) (per curiam) (employer may not recover damages it sustains when key employee is injured by third-party tortfeasor); see also Rockaway Blvd. Wrecking & Lumber Corp. v. Raylite Elec. Corp., 26 A.D.2d 9, 12, 269 N.Y.S.2d 926, 929 (1st Dep't 1966) (per curiam) ("'where a third person suffers damage by reason of a contractual obligation to the injured party, such damage is too remote and indirect to be-

[5] We do not decide whether the presence of a specific intent to harm a particular plaintiff would weigh in favor of a finding of proximate cause where, unlike here, the existence of directness under the Holmes factors is in doubt.

come the subject of a direct action ex delicto, in the absence of subrogation.'" (quoting Forcum-James Co. v. Duke Transp. Co., 231 La. 953, 962, 93 So. 2d 228, 230-31 (1957))); see also Pulka v. Edelman, 40 N.Y.2d 781, 785, 390 N.Y.S.2d 393, 396, 358 N.E.2d 1019 (1976) (New York law requires proximate cause in special duty cases). Although New York law appears to permit limited exceptions to the general requirement that the direct injury test be met, see Rockaway, 26 A.D.2d at 12, plaintiffs have brought no cases to our attention that would permit such a departure from the general rule in the present case. Hence, analogous principles to those that doomed plaintiffs' RICO causes of action also bar plaintiffs' common law fraud and special duty actions.

## V. Remaining Points

### A. Trust Principles

Plaintiffs assert that the direct injury test is not applicable in this case, because certain of the Funds are trusts governed by ERISA and the Taft-Hartley Act and other Funds are non-ERISA not-for-profit public employee trusts. First, plaintiffs contend that the direct injury test is only a rule of state insurance law, and state insurance law is inapplicable to ERISA funds. See 29 U.S.C. § 1144(b)(2)(B) (plan not to be subjected to "any law . . . purporting to regulate . . . insurance contracts"). However, as demonstrated by Holmes, AGC, and Kinsman, the proximate cause direct injury requirement is a common law rule of general application, not one simply limited to insurance cases.

Second, plaintiffs aver that traditional trust principles apply and displace the direct injury requirement. However, nothing in ERISA supports this argument. Even assuming that trust principles govern, case law suggests that when a Fund brings an action at law for tort against a third person it should be treated like any other plaintiff. See Restatement (Second) of Trusts § 280 cmt. a (1959) ("If a third person commits a tort with respect to the trust

property, the trustee can maintain such actions at law as he could maintain by reason of his ownership of the property as if he held it free of trust."); IV A.W. Scott, The Law of Trusts § 280.1 (1967) (remedies for torts against trust property are the same as if the property were held free of trust). Thus, it follows, that both ERISA and non-ERISA funds, like any plaintiff, would be subject to the requirements of proximate cause and its direct injury inquiry. Moreover, the specific civil remedies set forth in ERISA for redressing violations of that statute or of the provisions of an ERISA plan are simply inapplicable here, since no such violation is at issue in this case. 29 U.S.C. § 1132; see also Mertens v. Hewitt Assocs., 508 U.S. 248, 253-54, 124 L. Ed. 2d 161, 113 S. Ct. 2063 (1993). Therefore, that the funds are governed by ERISA or general trust principles does not, insofar as plaintiffs' complaint is concerned, change the law of proximate cause.

**B. State Entity Cases**

Plaintiffs also point to numerous cases that have arisen where States have brought a direct action against the tobacco companies to recover medical costs they expended on smokers, and district courts have upheld their right to sue. But, many of these cases are distinguishable because they involved state statutory provisions that the courts construed as allowing the state to sue directly. See State ex rel. Norton v. R.J. Reynolds Tobacco Co., 1997 CV-003432 (Colo. Dist. Ct. Oct. 2, 1998); State ex rel. Kelley v. Philip Morris, Inc., No. 96-84281-CZ (Mich. Cir. Ct. May 28, 1997); State ex rel. Humphrey v. Philip Morris, Inc., No. C1-94-8565 (Minn. Dist. Ct. Feb. 19, 1998); State v. Philip Morris, Inc., No. S 744-97 CnC (Vt. Super. Ct. Mar. 25, 1998); State v. American Tobacco Co., No. 96-2-15056-8 SEA, 1996 WL 931316 (Wash. Super. Nov. 19, 1996); State ex rel. Bronster v. Brown & Williamson Tobacco Corp., No. 97-0441-01 (Haw. Cir. Ct. Sept. 18, 1998). In addition, in some cases the unique quasi-sovereign rights of a state to sue to protect the health and welfare of their citizens was found to sustain standing. See

Texas v. American Tobacco Co., 14 F. Supp. 2d 956, 962-63 (E.D. Tex. 1997). Hence, in general, state cases are often distinguishable on the issue of proximate causation given the state's unique role relative to protection of its citizens, statutes governing Medicaid recoupment, and certain state statutes that permit states to maintain actions on behalf of their citizenry. However, this is not the scenario before us, and we have no reason to pass on it.

## CONCLUSION

As both parties acknowledge, we have discretion to consider all aspects of the district court's March 25 order, see Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 205, 133 L. Ed. 2d 578, 116 S. Ct. 619 (1996), but also have discretion to decline to adjudicate any aspect of the order, including the questions actually certified, see Koehler v. Bank of Bermuda Ltd., 101 F.3d 863, 864 (2d Cir. 1996). We answer the first question certified to us in the affirmative, that is, we hold that the economic injuries alleged in plaintiffs' complaint are purely derivative of the physical injuries suffered by plan participants and therefore too remote as a matter of law for them to have standing to sue defendants. In light of that disposition, we need not reach or determine the second certified question, that is, whether the federal Cigarette Labeling and Advertising Act preempts plaintiffs' state common law claims.

Accordingly, we hereby reverse the district court's March 25, 1998 order with respect to causes of action I and II (the RICO claims), V (the fraud claim), and VI (the special duty claim). The case is remanded to the district court with directions to dismiss plaintiffs' complaint.

**APPENDIX B**

LABORERS LOCAL 17 HEALTH & BENEFIT FUND and THE TRANSPORT WORKERS UNION NEW YORK CITY PRIVATE BUS LINES HEALTH BENEFIT TRUST,

Plaintiffs,

v.

PHILIP MORRIS, INC., R.J. REYNOLDS TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., B.A.T. INDUS. P/L/C/. LORILLARD TOBACCO CO., INC., LIGGETT & MYERS INC.,THE AMERICAN TOBACCO CO., UNITED STATES TOBACCO CO., THE COUNCIL FOR TOBACCO RESEARCH-USA, INC., THE TOBACCO INSTITUTE, INC., SMOKELESS TOBACCO COUNCIL, INC, and HILL &KNOWLTON, INC.,

Defendants.

Nos. 97 Civ. 4550(SAS), 97 Civ. 4676,
97 Civ. 7346, 97 Civ.8462, 97 Civ. 9395,
97 Civ. 9396, 97 Civ. 9397, 97 Civ. 9398,
97 Civ. 9399, 97 Civ. 9400, 97 Civ. 9401, 97 Civ. 9402

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

7 F. Supp. 2d 277

March 25, 1998, Decided
March 26, 1998, Filed

OPINION AND ORDER

SCHEINDLIN, District Judge:

## I. Background

Plaintiffs are labor union health and welfare trust funds (the "Funds") that supplement employers' basic medical benefits by providing death, disability and prescription drug benefits and related services. Defendants are tobacco companies and tobacco public relations firms. Plaintiffs allege that defendants have engaged in a conspiracy to deceive the general public, including plaintiffs, as to the health risks associated with smoking, the addictiveness of nicotine, and the levels of nicotine in their products. As a result, plaintiffs allege, they have spent millions of dollars more than they otherwise would have to provide medical benefits to health plan participants. The Funds have brought this action "to recover money expended . . . to provide medical treatment to their participants and beneficiaries who have suffered and are suffering from tobacco-related illnesses and to obtain appropriate injunctive relief." Class Action Complaint and Demand for Jury Trial ¶ 7, Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., No. 97 Civ. 4550 (S.D.N.Y. filed June 19, 1997) [hereinafter Compl.].[1] Plaintiffs allege RICO

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[1] Defendants presented their substantive arguments in memoranda filed in United Federation of Teachers Welfare Fund v. Philip Morris, Inc., No. 97-4676 (S.D.N.Y. filed June 25, 1997). Defendants' papers in Laborers Local 17 incorporate those arguments by reference. The reverse is true for plaintiffs. Accordingly, this opinion will refer to defendants' UFT opening and reply memoranda and to plaintiffs' Laborers Local 17 opposition brief. See Memorandum in Support of Defendants' Motion to Dismiss the Complaint for Failure to State a Claim, United Federation of Teachers Welfare Fund v. Philip Morris, Inc., No. 97-4676 (S.D.N.Y. filed June 25, 1997) (dated Oct. 17, 1997) [hereinafter Defs.' Mem.]; Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint, Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., No. 97 Civ. 4550 (S.D.N.Y. filed June 19, 1997) (dated Dec. 5, 1997) [hereinafter Pls.' Mem.]; Memorandum in Support of Defendants' Motion to Dismiss the Complaint for Failure to State a Claim, United Federation of Teachers Welfare Fund v. Philip Morris, Inc., No. 97-4676 (S.D.N.Y. filed June 25, 1997) (dated Jan. 27, 1998) [hereinafter Reply].

and antitrust violations, and assert common law claims for fraud, breach of special duty, and unjust enrichment.

Defendants have moved to dismiss the action under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. They contend that plaintiffs have no direct claim against defendants for three reasons: 1) as a matter of law, the chain of causation between plaintiffs' injuries and defendants' alleged acts is too attenuated to support a verdict for plaintiffs, because the alleged injuries are only remotely connected to defendants' alleged acts, 2) plaintiffs' sole remedy is by subrogation to their participants' claims, and 3) the federal Cigarette Labeling and Advertising Act preempts all of plaintiffs' common law claims. Defendants also raise additional count-specific objections to each of plaintiffs' claims.

**II. Jurisdiction**

This Court has subject matter jurisdiction over the action pursuant to 28 U.S.C. §§ 1331, 1337 (1994) because Counts I-III of the complaint raise questions of federal law. Supplemental jurisdiction over the state claims raised in Counts IV-X is asserted because the federal and state claims both derive from "a common nucleus of operative fact." United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130 16 L. Ed. 2d 218, (1966); Promisel v. First Am. Artificial Flowers, Inc., 943 F.2d 251, 254 (2d Cir 1991); 28 U.S.C. § 1367(a) (1994).

**III. Legal Standard for Motion to Dismiss**

In deciding a motion to dismiss under Rule 12(b)(6), the court must accept all material facts alleged in the complaint as true and must draw all reasonable inferences in the nonmovant's favor. See Kaluczky v. City of White Plains, 57 F.3d 202, 206 (2d Cir. 1995). The court may not grant the motion merely because recovery seems remote or unlikely. Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996) (quoting Scheuer v. Rhodes, 416 U.S. 232,

236, 94 S. Ct. 1683 40 L. Ed. 2d 90, (1974)). A complaint should not be dismissed for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

## IV. Discussion

In recent months, state and federal courts have seen an explosion of civil actions arising from the use, marketing or sale of tobacco products. To date over forty states have filed suit, as have cities, counties, and private third-party payors, all attempting to recover the cost of treating tobacco-related diseases. See Proposed Tobacco Industry Settlement, Preamble, ¶ 22 (June 20, 1997). All of these cases address common questions: If in fact the tobacco industry is liable for the cost of tobacco-related disease, to whom should it be held responsible?

As the contents of the tobacco industry's internal research and marketing documents become increasingly available to the general public, some have become convinced that the tobacco industry should be held liable for the entire cost of tobacco-related disease, however that cost was incurred.[2] Whether an industry should be penalized for successfully marketing a legal product is certainly an interesting question, but it is beyond the scope of any single lawsuit. Policymaking on such a scale is ordinarily left to the legislature; in fact, there are various proposals before Congress that would "mandate a total reformation and restructuring of how tobacco products are manufactured, marketed, and distributed in this country." Proposed Tobacco Industry Settlement,

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[2] See, e.g., Blue Cross Blue Shield of Minnesota, Tobacco Web Site (visited Mar. 19, 1998) <www.mnbluecrosstobacco.com> (publishing trial exhibits in State by Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. filed Aug. 17, 1994)).

Preamble ¶ 1.[3] The issue addressed here, in contrast, is much more limited: to determine whether and how defendants should be held responsible to these particular plaintiffs.

As a result, allegations that the defendants have marketed their products to children, that these products are unreasonably dangerous, or that they have inflicted harm on individual smokers are not relevant here. Nor are claims of harm to society or to plaintiffs as members of the general public. Rather, as fundamental principles of proximate cause dictate, plaintiffs may only recover for injuries that they have suffered. If those injuries were caused by defendants, then defendants should indeed be held responsible. But plaintiffs have no standing to vindicate the public's rights. When stripped to the basics, the issues in this litigation are relatively simple: To the extent that plaintiffs have alleged that defendants have harmed them directly, they have stated a claim on which relief may be granted.

**A. Do plaintiffs have a direct claim against defendants?**

Because the issue of proximate cause is central to the disposition of this case, I will discuss it in some detail before addressing plaintiffs' state and federal claims individually.

**1. Proximate Cause**

Defendants' fundamental argument is that plaintiffs have no direct claim against them because they did not proximately cause plaintiffs' injuries. In general terms, the concept of "proximate cause" prevents a recovery from a party for remote and derivative injuries to a plaintiff resulting from that party's conduct toward another. See, e.g., Holmes v. Sec. Investor Protection

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[3] See also Tobacco Sales to Minors Prevention, S. 1713, 105th Cong. (1997); Public Health Service Act, S. 1648, 105th Cong. (1997); Tobacco Products vs. Children, S. 1638, 105th Cong. (1997); Tobacco Quota Fluctuations, H.R. 3264, 105th Cong. (1997); Federal Fund Expenditure Under Tobacco Settlements, H.R.J. Res. 109, 105th Cong. (1997).

Corp., 503 U.S. 258, 268-69, 112 S. Ct. 1311 (1992), 117 L. Ed. 2d 532; Mobile Life Ins. Co. v. Brame, 95 U.S. 754, 758-59, 24 L. Ed. 580 (1877). Under the common law, therefore, one who pays the medical expenses of another may not recover those expenses from the third-party tortfeasor who caused the damage. See, e.g., Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 532 n.25, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) (citing 1 J. Sutherland, Law of Damages 55-56 (1882)); Anthony v. Slaid, 52 Mass. 290, 291 (1846) (plaintiff who undertook to support town paupers could not recover from tortfeasor who assaulted pauper, increasing plaintiff's expenses, as damages were too remote). Plaintiffs have alleged that defendants deceived them about the dangers of tobacco, inhibiting plaintiffs' ability to minimize health-care expenses, and shifting the cost of tobacco-related disease to the plaintiffs. See, e.g., Compl. ¶¶ 269-74. Defendants maintain that plaintiffs' claims are no different from those rejected in Anthony v. Slaid, and that the alleged injuries, though worded as direct claims, are equally remote.

The question of when an alleged injury becomes too remote to allow recovery is often difficult. "Because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." Palsgraf v. Long Island R. Co., 248 N.Y. 339, 352, 162 N.E. 99 (1928) (Andrews, J. dissenting).[4] That point is reached when "the connection between the defendants' negligence and the claimants' damages [becomes] too tenuous and remote to permit recovery." Kinsman Transit Co. v. City of Buffalo, 388 F.2d 821, 824-25 (2d Cir. 1968). While "a variety of factors may be relevant in assessing legal [proximate] cause," in order to plead a prima facie case, a plaintiff is generally required to "show that the defendant's negligence was a substantial cause of the events which

[4] While not part of the majority opinion, the Andrews dissent is often quoted in discussions of proximate cause. See, e.g., Associated Gen. Contractors, 459 U.S. at 537 n.34; Blue Shield of Va. v. McCready, 457 U.S. 465, 478 n.13, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982).

produced the injury." Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166, 414 N.E.2d 666 (1980); accord Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 520, 429 N.Y.S.2d 606, 407 N.E.2d 451 (1980). If such a showing is made, no intervening acts -- for example, the decision of plan participants to smoke -- will break the causal connection if such acts are a reasonably foreseeable result of the defendants' negligence. Derdiarian, 51 N.Y.2d at 315; Stephenson by Coley v. S.C. Johnson & Son, Inc., 168 Misc. 2d 528, 638 N.Y.S.2d 889, 892 (Sup. Ct. N.Y. Co. 1996), aff'd, 658 N.Y.S.2d 636 (2nd Dep't 1997).

Other factors that courts may consider when determining proximate cause in intentional tort cases include: 1) the defendant's intent to do harm, 2) the degree of moral wrong involved, and 3) the seriousness of the harm originally intended. Restatement (Second) of Torts § 435B (1965). These factors are considered because the greater the intent to harm, the more foreseeable it is that harm will result.

These general principles govern all common-law claims, including the intentional torts alleged in the complaint. They also apply to plaintiffs' statutory claims. Congress intended that antitrust litigation "would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation[,]" including rules defining proximate cause. Associated Gen. Contractors, 459 U.S. at 533 103 S. Ct. 897. New York's antitrust statute, the Donnelly Act, has been interpreted similarly. Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327, 335, 525 N.Y.S.2d 816, 520 N.E.2d 535 (1988) (Donnelly Act "should generally be construed in light of Federal precedent"); Van Dussen-Storto Motor Inn, Inc. v. Rochester Tel. Corp., 63 A.D.2d 244, 407 N.Y.S.2d 287, 293 (4th Dep't 1978) (defining proximate cause under Donnelly Act by citing to federal precedent); see also Tri-Star Pictures, Inc. v. Leisure Time Productions, B.V., 1992 WL 296314, at *6 (S.D.N.Y. 1992), aff'd, 17 F.3d 38 (2d Cir. 1994) (citing Van Dussen-Storto Motor Inn)

(proximate cause under Donnelly Act). The same proximate cause constraints apply to RICO claims. Holmes, 503 U.S. at 268; Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 23-24 (2d Cir. 1990) (RICO violations "proximately cause a plaintiff's injury if they are a substantial factor in the sequence of responsible causation, and if the injury is reasonably foreseeable or anticipated as a natural consequence.").

The purpose of requiring a direct relationship between defendants' conduct and plaintiffs' injury is threefold. First, the more remote the injury, the more difficult it is to ascertain the amount of damages attributable to the defendants' acts, rather than to some other factor. Holmes, 503 U.S. at 269 112 S. Ct. 1311. Second, allowing indirectly injured plaintiffs to proceed creates the risk of multiple recoveries. Id. Third, those who are directly injured are in a better position to "vindicate the law as private attorneys general," without any of the problems found in suits based on more remote injuries. Id. at 269-70, 112 S. Ct. 1311.

If all of plaintiffs' allegations regarding defendants' knowledge and intentare true -- and I must assume as much for the purposes of this motion -- then a jury could reasonably find that plaintiffs' injuries were foreseeable, and that defendants' behavior was a substantial cause of those injuries. For example, plaintiffs maintain that defendants knew how to manufacture a less harmful cigarette but did not do so because it would have compromised their litigation strategy. Compl. ¶¶ 125-39. One direct consequence of such a decision would be to limit plaintiffs' ability to reduce their health care costs by encouraging their participants to use less harmful tobacco products. The next step, then, is to analyze the policy factors enunciated in Holmes to determine whether plaintiffs' injuries are too remote for recovery as a matter of law.

First, are there other parties better suited to act as "private attorneys general"? Individual smokers and public agencies have an incentive equal to that of the plaintiffs' to "prosecute" defen-

dants for deceiving the public about the dangers of tobacco. None, however, would have a strong interest in vindicating the harm to plaintiffs -- their reduced ability to minimize health-care expenses and their assumption of the financial burden of tobacco-related disease among plan participants. There is a substantial risk that those harms will go unremedied if this action is not allowed to continue.

Next, is there a risk of multiple recoveries for the same harm? Plaintiffs are correct in arguing that there is not. No other party may recover for harm to the Funds' infrastructure, financial stability, or ability to project costs. To the extent that the harm took the form of increased expenses for medical care, those costs will only be recovered once. Plan participants who bring personal injury actions against the defendants may not recover expenses that the Funds have already reimbursed. N.Y. C.P.L.R. 4545(c) (McKinney 1992). Conversely, as defendants' briefs discuss at length, plaintiffs may not recover for the personal injuries of their participants. Because costs borne only by the Funds are recoverable only by the Funds, there can be no risk of multiple recoveries.

Finally, will it be difficult to ascertain the damages caused by the defendants? Plaintiffs face a significant burden in the damages phase of litigation. Not only will they have to translate intangible concepts such as "reduced ability to minimize health-care expenses" into monetary figures, but they will have to propose a plausible method of separating damages caused by defendants from damages caused by other factors. Ultimately, plaintiffs may not be able to sustain their burden of proof. That does not mean, however, that they should not be allowed to make the attempt. See Texas v. American Tobacco Co., No. 5-96-CV-91, slip op. at 17 (difficulty in and of itself does not bar action).

Proximate cause is ordinarily a question for the fact finder to resolve. Derdiarian, 51 N.Y.2d at 314-15; 434 N.Y.S.2d 166, 414

N.E.2d 666 Nallan, 50 N.Y.2d at 520 429 N.Y.S.2d 606, 407 N.E.2d 451. "Obviously there is a substantial difference between alleging something and proving it." Arizona v. American Tobacco Co., Inc., No. CV-96-14769, slip op. at 2 (Ariz. Super. Ct. May 27, 1997) (order denying motion to dismiss and holding that proximate cause was not precluded by the "very nature" of claimed damages). Nonetheless, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974). A pleading will survive a motion to dismiss if it alleges a set of facts that would entitle the plaintiff to relief if proven. See id. at 236, 94 S. Ct. 1683; Conley v. Gibson, 355 U.S. 41, 45-46 78 S. Ct. 99, 2 L. Ed. 2d 80, (1957). Plaintiffs have stated a prima facie case for several of their claims, as discussed in part IV.B below. While these claims may be difficult to prove, plaintiffs' claims of injury are not so remote as to warrant dismissal at this stage.

**2. Subrogation**

Defendants maintain that because plaintiffs' claims are indirect, their only remedy is by suing as subrogees of any plan participants harmed by the defendants. In general, subrogation is a legal device that enables one party (the "subrogee") to put itself in the place of a party who has sustained an injury in order to obtain recovery. Subrogation may be available either through statute or private agreement. Plaintiffs here have no statutory right to subrogation; however, many of their employee benefit plan contracts contain subrogation provisions. See, e.g., Defs.' Mem. at 2 (quoting benefit plan for participants in the United Federation of Teachers Welfare Fund). As subrogees, plaintiffs would "stand in the shoes" of the injured participants, and their claims would be subject to the same affirmative defenses, such as assumption of risk, as would apply in actions brought by the harmed individuals.

Some courts in other tobacco-related cases have held that subrogation is the exclusive remedy against these defendants. However, in each of those cases, the right of subrogation arose by statute, not by private contract. Iowa v. R.J. Reynolds, No. CL71048 (Iowa Dist. Ct. Aug. 26, 1997); Maryland v. Philip Morris Inc., 1997 WL 540913 (Md. Cir. Ct. 1997); McGraw v. American Tobacco Co., No. 94-C1707 (W.Va. Cir. Ct. June 31, 1997) (orders denying motions to dismiss on subrogation grounds). Iowa, Maryland, and West Virginia sued tobacco companies to recover the cost of providing health care to their citizens. In each case, the court relied on the principle that where there is a statutory remedy, that remedy is exclusive unless the statute indicates otherwise. Each court concluded that the applicable state Medicaid statute, which created a right of subrogation, was intended to provide an exclusive remedy for the State. Iowa, No. CL71048, slip op. at 6-7; Maryland, 1997 WL 540913 at *3; McGraw, No. 94-C1707, slip op. at 5. Courts applying other statutes have reached the opposite conclusion on the ground that the language in their State Medicaid statutes created a cumulative, rather than an exclusive remedy. Texas v. American Tobacco Co., No. 5-96CV-91, slip op. at 10-11 (E.D. Tex. Sept. 8, 1997) (statutory remedy does not extinguish prior common law cause of action unless it does so explicitly); Illinois v. Philip Morris, Inc., No. 96L13146, slip op. at 5 (Ill. Cir. Ct. Nov. 13, 1997) (nothing in the statute limits the State to subrogation) (orders partially granting motions to dismiss). Neither analysis is directly applicable here, as New York's Medicaid statute does not apply to these plaintiffs.

There is no statute establishing subrogation as plaintiffs' exclusive remedy. Instead, plaintiffs' subrogation rights were created by private contracts with plan participants. Such rights cannot limit the Funds' ability to recover from those not party to the agreements. Thus, if plaintiffs have stated valid causes of action, the fact that they may also be entitled to sue in subrogation would not extinguish them.

**3. Preemption**

Defendants argue in the alternative that plaintiffs' common law claims have been preempted by the federal Cigarette Labeling and Advertising Act. 15 U.S.C. §§ 1331-40 (1994) [hereinafter "the Act"]. The Act mandates certain uniform warning labels on cigarette packaging and preempts all State regulation of tobacco advertising: "No statement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." Id. § 1334(b). Defendants contend that this language preempts plaintiffs' fraud, breach of special duty, and unjust enrichment claims, which are New York common law causes of action.

The controlling decision addressing the scope of the preemption provision is Cipollone v. Liggett Group, Inc., 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) (plurality opinion). Cipollone held that common law rules impose "requirements or prohibitions" within the meaning of the Act because they are "premised on the existence of a legal duty." Id. at 522 112 S. Ct. 2688. The Act, therefore, applies to common law claims. Id. at 523 112 S. Ct. 2608 (Scalia and Thomas, JJ., concurring in relevant part). To determine whether a particular claim is preempted, the court must "ask whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to advertising or promotion,' giving that clause a fair but narrow reading." Id. at 523-24, 112 S. Ct. 2608.

Count V of the complaint alleges that defendants intentionally "misrepresented, failed to disclose and concealed material facts" about the hazards of tobacco use. Compl. ¶ 265. The Act preempts fraudulent misrepresentation claims that merely allege that defendants should have included additional or more clearly

stated warnings in their advertisements. Cipollone, 505 U.S. at 524 112 S. Ct. 2608. Plaintiffs, however, allege intentional fraud, both by false representation and by concealment of material facts. Cipollone expressly held that claims of fraud by intentional misstatement are not preempted because they "are predicated not on a duty 'based on smoking and health' but rather on a more general obligation: the duty not to deceive." Id. at 528-29 (Blackmun, Kennedy, and Souter, JJ., concurring in the judgment in relevant part); see also State by Humphrey v. Philip Morris Inc., No. C1-94-8565 ( 1998 WL 257214 (Minn. Feb. 2, 1998); DaSilva v. American Tobacco Co., 175 Misc. 2d 424, 667 N.Y.S.2d 653 (Sup. Ct. N.Y. Co. 1997); Small v. Lorillard Tobacco Co., Inc., 175 Misc. 2d 294, 668 N.Y.S.2d 307 (Sup. Ct. N.Y. 1997) (denying motions to dismiss on preemption grounds). The Act, therefore, does not bar plaintiffs' fraud claims.

Count VI states that defendants voluntarily assumed a special duty to protect the public health and to provide information about the effects of tobacco use. Compl. ¶ 279. Cipollone did not discuss preemption of special duty claims. In the related context of express warranties, however, the Court concluded that "a common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . imposed under State law.'" Cipollone, 505 U.S. at 526, 112 S. Ct. 2608 (quoting 15 U.S.C. § 1334(b)). The predicate duty is imposed not by the State, but by the party assuming the obligation. Id. at 525, 112 S. Ct. 2608. Claims based on voluntarily assumed obligations, then, are not preempted because they do not fall within the language of the Act. Id. at 525-26 (Blackmun, Kennedy, and Souter, JJ., concurring in the judgment in relevant part); State by Humphrey v. Philip Morris Inc., No. C1-94-8565 1998 WL 257214 (Minn. Feb. 2, 1998) (order finding no preemption). Count VI is not preempted because the special duty that it alleges is one that would have been voluntarily assumed by defendants rather than one imposed by the State.

Plaintiffs' final common law claim is for unjust enrichment. Compl. ¶¶ 308-15. Plaintiffs allege that by paying their participants' tobacco-related medical costs, they have conferred a benefit on the defendants that the defendants should repay. Compl. ¶¶ 313-14. Payment of medical costs is unrelated to the "advertising and promotion" of tobacco. Assuming for the moment that plaintiffs' payments created a valid unjust enrichment claim, a "fair but narrow reading" of the Act, Cipollone, 505 U.S. at 524, 112 S. Ct. 2608, reveals that such a claim is not within the statute's reach. Accordingly, the Cigarette Labeling and Advertising Act does not preempt any of plaintiffs' common law claims.

**B. Have plaintiffs stated a prima facie case for each claim?**

In addition to urging the court to dismiss the entire complaint on remoteness grounds, defendants raise count-specific objections to each of plaintiffs' federal and state claims. I will address each of these in turn.

**1. RICO**

RICO authorizes private civil actions by "any person injured in his business or property by reason of," 18 U.S.C. § 1964(c) (1994), "a pattern of racketeering activity" id. § 1962, such as fraud or obstruction of justice. See id. § 1961. As discussed above, plaintiffs' showing of factual and proximate cause is sufficient to survive a motion to dismiss. In an action brought pursuant to statute, however, standing requires more than mere causation: There is also the issue of statutory intent. To satisfy the requirement, "the plaintiff[s] must show both that [they are] within the class the statute sought to protect and that the harm done was one that the statute was meant to prevent." Abrahams v. Young & Rubicam Inc., 79 F.3d 234, 237 (2d Cir. 1996).

Counts I and II describe the sort of "pernicious commercial practices" that RICO was intended to prevent. See Ehrich v.

B.A.T. Indus. P.L.C., 964 F. Supp. 164, 166-67 (D.N.J. 1997) (quoting Cuzzupe v. Paparone Realty Co., 596 F. Supp. 988, 991 (D.N.J. 1984) (RICO designed to eliminate commercial practices, not personal injuries)). In Count I, plaintiffs allege that the defendant tobacco companies violated § 1962(c) by conducting certain enterprises through a pattern of racketeering activity, including mail and wire fraud, perjury, and obstruction of justice. Compl. ¶¶ 212-25. Two or more of these acts constitute "racketeering" if they occur often enough to comprise a pattern of activity.[5] The enterprises identified are the Tobacco Institute, the Council for Tobacco Research, and a "public relations enterprise" that amounted to an association-in-fact in which all defendants participated. Plaintiffs' RICO Statement at 38-39, Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., No. 97 Civ. 4550 (S.D.N.Y. filed June 19, 1997) [hereinafter RICO Statement]. Count II alleges that defendants used income derived from that pattern of racketeering activity to acquire and operate the Tobacco Institute and the Council for Tobacco Research, in violation of § 1962(a). Compl. ¶¶ 226-33. The complaint also alleges a RICO conspiracy.[6] See 18 U.S.C. § 1962(d).

The question, then, is whether plaintiffs fall within RICO's protected "zone-of-interests." See Holmes, 503 U.S. 258, 112 S. Ct. 2608, (Scalia, J., concurring). Only the direct targets of a racketeering scheme have standing as intended beneficiaries of the RICO laws. Abrahams, 79 F.3d at 238 (plaintiff's injuries "did not flow from the harms that the predicate acts . . . were intended to cause and the laws against them were intended to prevent"); In re American Exp. Co. Shareholder Litigation, 39 F.3d 395, 400 (2d Cir. 1994) (shareholders harmed by public exposure of RICO violations aimed at competitor not intended targets of violations); Hecht, 897 F.2d at 24 (salesman had no RICO claim

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[5] Defendants do not dispute the adequacy of plaintiffs' allegations regarding the "pattern" element.

[6] See Salinas v. United States, 522 U.S. 52, 118 S. Ct. 469, 477-78, 139 L. Ed. 2d 352 (1997) (RICO conspiracy exists if alleged conspirator knew of conspiracy's goals and agreed to facilitate them).

where employer's fraud drove potential customers away); cf. Standardbred Owners Assoc. v. Roosevelt Raceway Assoc., 985 F.2d 102, 104 (2d Cir. 1993) (plaintiffs were direct targets of fraudulent schemes). Plaintiffs maintain that they, along with their participants and others, were among the direct targets of the fraud alleged. In support of that statement, they claim that defendants made "deliberate efforts . . . to give Plaintiffs . . . the materially false impression that there are no negative health consequences to tobacco use, . . . that nicotine is not addictive and that the Tobacco Companies are not manipulating the nicotine levels in their products." Compl. ¶ 211; RICO Statement at 35-36. An alleged object of defendants' conduct "was the avoidance and shifting of tobacco-related health care costs onto others, including Plaintiffs." Compl. ¶ 224; accord RICO Statement at 33, 46. Because these allegations demonstrate that plaintiffs do have standing, their RICO claims are sufficient to withstand a motion to dismiss.

Defendants argue that, causation issues aside, plaintiffs' RICO claims must be dismissed as a matter of law because "all of the Funds' claimed injuries result from alleged personal injuries to their participants," rather than injuries to business or property. Defs.' Mem. at 13. They particularly rely on the holding in City and County of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130 (N.D. Cal. 1997) [hereinafter San Francisco I], in which local governments sought to recover the cost of treating indigent residents suffering from tobacco-related diseases. There, the court dismissed the RICO claim with leave to amend, finding that plaintiffs' claims were "wholly derivative" of those of the individual smokers.[7] Id. at 1139. As a result, plaintiffs' injuries consisted only of the economic consequences of personal injuries, which are not compensable under RICO, and that plain-

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[7] Plaintiffs did not pursue the RICO claim in their Second Amended Complaint. City and County of San Francisco v. Philip Morris, Inc., No. C-26-2090 1998 WL 230980 (N.D. Cal. Mar. 3, 1998) (order denying motion to dismiss second amended complaint) [hereinafter San Francisco II].

tiffs therefore had failed to meet the proximate cause requirements outlined in Holmes. Id. at 1138.

When defendants argue that plaintiffs' claims are derived from personal injuries, they are simply repeating their argument that plaintiffs' injuries are too remote. By determining that plaintiffs have adequately alleged proximate cause, I have already concluded that plaintiffs' claims are not based on the personal injuries of their participants. See part IV.A.2. Instead, they are based on the harm to plaintiffs' infrastructure and financial stability caused by defendants' alleged attempts to deceive the plaintiffs. As a result, they do allege an injury to business or property, as the statute requires. Thus, defendants' motion to dismiss Counts I and II is denied.

**2. Antitrust**

Federal antitrust law authorizes private civil actions by "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws[.]" 15 U.S.C. § 15 (1994). Those laws forbid "[e]very contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations[.]" Id. § 1. New York antitrust law prohibits "[e]very contract, agreement, arrangement or combination whereby . . . [c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service . . . is or may be restrained." Donnelly Act, N.Y. Gen. Bus. Law § 340.1 (McKinney 1988). As discussed in part IV.B.1 above, I have already concluded that plaintiffs, claims are for injuries to business or property that are not so remote as to prevent recovery. Standing thus depends on whether defendants' alleged acts constitute an antitrust violation and on whether plaintiffs are within the class the antitrust laws seek to protect. McCready, 457 U.S. at 473; see also Abrahams, 79 F.3d at 237.

An antitrust violation is an agreement in restraint of trade that causes "injury of the type the antitrust laws were intended to prevent . . . . The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701(1977); see also Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969) (injury should be "the type of loss that the claimed violations of the antitrust laws would be likely to cause.").

In Count III, plaintiffs allege that defendants conspired to restrain trade in the market for tobacco products by agreeing to eliminate competition in the research, development, production and marketing of safer alternative tobacco products. Compl. ¶¶ 240-41.[8] Conduct suppressing product innovation and development has an anticompetitive effect. See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988); American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982) (refusal of standard-setting organizations to approve new products was anticompetitive); cf. Associated Gen. Contractors, 459 U.S. at 528 103 S. Ct. 897 ("Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions . . . ."). In this respect, Count III alleges a violation of the type the antitrust laws are intended to prevent.[9]

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[8] Count IV restates the allegations in Count III in the context of New York law.

[9] Other activities alleged in Count III, while possibly unlawful, do not constitute antitrust violations. Plaintiffs claim that defendants suppressed information that would otherwise have affected consumer behavior in the market for tobacco products, causing price inflation and increasing the demand for tobacco products. Compl. ¶¶ 238, 241. Creating increased demand for a product is not an anticompetitive activity. There can be no antitrust violation when the effect of an agreement is to increase competition, even if that agreement is unlawful for some other reason. Brunswick, 429 U.S. at 488, 97 S.Ct. 690; see also McCready, 457 U.S. at

Although plaintiffs have alleged an antitrust violation, their antitrust claims must be dismissed because plaintiffs are not "within that area of the economy . . . endangered by [that] breakdown of competitive conditions." McCready, 457 U.S. at 480 (quoting In re Multidistrict Vehicle Air Pollution, 481 F.2d 122, 129 (9th Cir. 1973)). The Second Circuit has adopted a "target area" test for determining antitrust standing: the plaintiff must either be the "direct target" of the alleged antitrust violation or fall within its "target area." Crimpers Promotions Inc. v. Home Box Office, Inc., 724 F.2d 290, 292 (2d Cir. 1983) (citing Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970)). The target area is that sector of the economy endangered by a breakdown of competitive conditions in the particular industry. Id. Plaintiffs have not alleged that they were a direct target of defendants' acts, or that they are within the target area of those acts.

Plaintiffs allege that defendants agreed to forego the development of safer alternative tobacco products. The direct targets of such an agreement, if it exists, are obviously consumers of tobacco products. The target area is the tobacco sector of the economy in that the unlawful agreement to suppress development would result in a market where neither demand nor prices would be governed by market forces. Plaintiffs claim that as a result of defendants' conduct, medical costs for their participants with tobacco-related diseases have increased. This is not an injury created by endangering competition in the target area. In fact, it is not clear that plaintiffs' interests would be served by enhanced competition in the tobacco market. See Associated

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482, 102 S.Ct. 2540. Plaintiffs also claim that defendants restrained research and withheld information from participants in the market for health care. Compl. ¶¶ 248-49, 254. Such activities are not antitrust violations because they do not restrict competition among health care providers. Antitrust law forbids agreements in restraint of the flow of commerce, not the flow of information.

Gen. Contractors, 459 U.S. at 539 103 S. Ct. 897. While stifled product innovation may have increased the number of participants with tobacco-related disease, plaintiffs also allege that anticompetitive pressures have increased the price of tobacco products, an effect which would tend to reduce the number of tobacco consumers. Therefore, as they were not targets of the anticompetitive activity alleged, plaintiffs do not have standing to pursue the claimed antitrust violation. Accordingly, defendants' motion to dismiss Counts III and IV is granted.

**3. Fraud**

Common law fraud may consist of either fraudulent misrepresentation or fraudulent concealment. Plaintiffs' fraud claim alleges both. To prove fraudulent misrepresentation under New York law, a plaintiff must show: 1) a material false representation, 2) intent to defraud the plaintiff thereby, 3) reasonable reliance on the representation, and 4) damage resulting from such reliance. Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank, 57 F.3d 146, 153 (2d Cir. 1995); Mallis v. Bankers Trust Co., 615 F.2d 68, 80 (2d Cir. 1980). Each element must be shown by clear and convincing evidence. Banque Arabe, 57 F.3d at 153. To establish fraudulent concealment, a plaintiff must prove all of the above elements, and must show by clear and convincing evidence that the defendant had a duty to disclose the material information concealed as well. Id. That duty may arise from "the need to complete or clarify [a] partial or ambiguous statement, or from a fiduciary or confidential relationship between the parties." Id. at 155 (citations omitted). It may also arise where one party has superior knowledge of certain information, not readily available to the other party, and knows that the second party is acting on the basis of mistaken knowledge. Id.

Count V alleges that plaintiffs relied on statements in which defendants promised to disclose all material information discovered about the effects of tobacco on human health. Compl. ¶¶

274-75. Plaintiffs charge that despite that promise, defendants intentionally "misrepresented, failed to disclose and concealed material facts about the human health hazards of tobacco use." Id. ¶ 265. They allegedly misrepresented those facts by making partial and incomplete statements concerning the health effects of smoking, id. ¶ 267, and fraudulently concealed material facts by burying the results of secret tobacco research not readily available to the public, id. ¶ 266. Plaintiffs claim that because they accepted the information they received from the defendants as true, they did not take action as quickly or as thoroughly as they otherwise would have. Instead, they depended on false and incomplete information when deciding what actions to take to reduce tobacco use among their participants. This reliance ultimately led to an increase in their health care costs. Id. ¶¶ 269, 274.

For the purposes of this motion, I must accept as true plaintiffs' allegations that defendants have been conducting secret research into the dangers of tobacco and that they have intentionally suppressed the negative results of that research. If so, then defendants have had superior knowledge of material information not readily available to the plaintiffs, and their public statements regarding the health effects of smoking have been, at best, incomplete. Under these circumstances, defendants would have had a duty to disclose the results of their research, as plaintiffs were conducting their business on the basis of incomplete knowledge of the dangers of tobacco.

Defendants argue that if plaintiffs relied on defendants' representations, that reliance was not justifiable because plaintiffs were sophisticated parties with access to many other sources of information. New York follows a two-tier standard in determining whether reliance is reasonable. When matters are held to be "peculiarly within defendant's knowledge," a plaintiff may rely on the defendant's statements without further investigation, "as [it] has no independent means of ascertaining the truth." Mallis, 615 F.2d at 80; Lazard Freres & Co. v. Protective Life

Ins. Co., 108 F.3d 1531, 1542 (2d Cir. 1997). "Indeed some cases have imposed liability in situations in which plaintiff could have determined the truth with relatively modest investigation." Mallis, 615 F.2d at 80. When misrepresentations concern matters not peculiarly within the defendant's knowledge, New York courts have often found no justifiable reliance, holding that if a plaintiff "has the means of knowing, by the exercise of ordinary intelligence, the truth . . . [it] must make use of those means." Mallis, 615 F.2d at 80-81; Banque Arabe, 57 F.3d at 156; Lazard Freres, 108 F.3d at 1542. Such decisions have generally involved plaintiffs who were "placed on guard or practically faced with the facts." Mallis, 615 F.2d at 81.

In the cases pending here, a jury could reasonably conclude that the truth about the health effects of tobacco was peculiarly within the defendants' knowledge. Plaintiffs maintain that defendants assumed responsibility for conducting and reporting tobacco research, and that they took steps to ensure that the public would not be able to obtain the negative results. Compl. ¶¶ 109-24. A jury accepting those allegations could find that it was justifiable for plaintiffs to accept the defendants' statements about tobacco as true without conducting an independent investigation. These are questions of fact that cannot be decided at this stage of the proceedings. For the same reason, it is not yet appropriate to reach the question of whether plaintiffs relied to their detriment on defendants' statements -- i.e., whether their costs would have been reduced had they known of the concealed information. Plaintiffs have set forth "circumstances constituting fraud" with sufficient particularity. See Fed. R. Civ. P. 9(b). Whether they will be able to prove their claim is a matter reserved for the trier of fact. See San Francisco II,957 F.Supp. at 1144-45 (order denying motion to dismiss fraud claim as pleaded in second amended complaint). Consequently, defendants' motion to dismiss Count V is denied.

**4. Breach of Special Duty**

Under certain circumstances the law imposes a duty of care on one who acts for the benefit of another, even in the absence of a contractual relationship. "One who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." Glanzer v. Shepard, 233 N.Y. 236, 239, 135 N.E. 275 (1922) (citations omitted); see also Nallan, 50 N.Y.2d at 522 (quoting Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 167-68, 159 N.E. 896 (1928)). If a duty of care exists, then "a tort may result as well from acts of omission as of commission." Moch, 247 N.Y. at 167. Existence of a duty is a question of law for the court to decide. Gerdowsky v. Crain's N.Y. Business, 188 A.D.2d 93, 593 N.Y.S.2d 514, 515 (1st Dep't 1993).

In Count VI, plaintiffs contend that defendants assumed a duty to "those who advance the public health" by promising to assist in research efforts and to provide complete information about smoking and health. Compl. ¶¶ 278-79. They allege that defendants' subsequent conduct demonstrated a lack of reasonable care in the performance of that duty. Id. ¶ 281. Finally, they claim that they delayed taking action to reduce costs associated with tobacco-related disease because they relied on defendants' promises. Id. ¶¶ 280-82. As discussed above, a jury could reasonably conclude that defendants were in the best position to discover the truth about the health effects of tobacco. See pt. IV.B.4. Having done so, it could then reasonably find that it was justifiable for plaintiffs to rely on defendants' promises to seek out and publicize that information.

The Restatement (Second) of Torts summarizes the breach of special duty doctrine as follows:

> One who undertakes . . . to render services to another which he should recognize as necessary for the protection of the other's person or things, is

> subject to liability to the other for physical harm resulting from his failure to exercise reasonable care if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (1965). Defendants argue that Count VI does not state a claim because plaintiffs have not alleged that they suffered physical harm. Compare Illinois v. Philip Morris, Inc., No. 96L13146, slip op. at 17-18 (Ill. Cir. Ct. Nov. 13, 1997); Iowa v. R.J. Reynolds, No. CL71048, slip op. at 11 (Iowa Dist. Ct. Aug. 26, 1997); Washington v. American Tobacco Co., No. 96-2-15056-8-SEA, slip op. at 4 (Wash. Super. Ct., June 10, 1997) (special duty claims dismissed because no physical harm alleged) with San Francisco I, 957 F. Supp. at 1143; San Francisco II, slip op. at 21 (physical harm not required). New York has not adopted the Restatement's physical harm requirement. On the contrary, New York courts have recognized that economic loss or damage to property may give rise to an action for breach of an assumed duty. Glanzer, 233 N.Y. 236, 135 N.E. 275 (defendant who negligently certified weight of shipment of beans liable for resulting economic loss); Moch, 247 N.Y. 160, 159 N.E. 896 (no liability for property damage because no proximate cause found). While these cases predate the Restatement by several decades, no court has overruled them. It is likely that a New York court, if presented with the question, would hold that New York continues to recognize such causes of action. A federal court should not restrict a common law cause of action in a manner that the state courts have not required. Accordingly, plaintiffs are not required to allege that defendants have caused them physical harm.

The remaining issue to be decided is whether defendants assumed a duty of care to the plaintiffs. An assumed duty arises "once a person undertakes a certain course of conduct upon which another relies." Heard v. City of New York, 82 N.Y.2d 66, 72, 603 N.Y.HeardS.2d 414, 623 N.E.2d 541 (1993); Nallan, 50 N.Y.2d at 522, 429 N.Y.S.2d 606, 407 N.E.2d 451. In deciding whether a duty was assumed under New York law, "the question is whether defendant's conduct placed plaintiff in a more vulnerable position than plaintiff would have been in had defendant done nothing." Heard, 82 N.Y.2d at 72; Nallan, 50 N.Y.2d at 522 429 N.Y.S.2d 606; Jansen v. Fidelity & Casualty Co. of New York, 165 A.D.2d 223, 566 N.Y.S.2d 962, 964 (3rd Dep't 1991), aff'd, 79 N.Y.2d 867, 581 N.Y.S.2d 156, 589 N.E.2d 379 (1992); see also Moch, 247 N.Y. at 168 ("The query always is whether the purported wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument of good.").

The allegations in Count VI, when assumed to be true, indicate that defendants voluntarily assumed a duty to the plaintiffs. Relying on defendants' promises to "aid and assist the research effort into all phases of tobacco use and health," Compl. ¶ 279, plaintiffs made decisions that negatively affected the financial health of their businesses. That negative impact was the direct result of defendants' promise to act on plaintiffs' behalf. Had defendants fully kept those promises, plaintiffs would have been alerted to the full cost of tobacco-related disease. Had defendants remained silent, plaintiffs would likely have obtained that information from other sources. By assuming to act, defendants thereby become subject to the duty of acting carefully, if at all. See Glanzer, 233 N.Y. at 239, 135 N.E. 275.

While plaintiffs may recover for breach of any duty that defendants assumed on their behalf, they may not recover for breach of a duty assumed to another. "[A] duty directly assumed for the benefit of a particular person or entity does not extend to

third parties who were not the intended beneficiaries of the subject undertaking."[10] Jansen, 566 N.Y.S.2d at 964. Neither may plaintiffs recover for breach of a duty voluntarily assumed on behalf of the public generally. It is the responsibility of the courts to "fix the orbit of duty" within the limits dictated by both policy and logic. Jansen, 566 N.Y.S.2d at 965. If any member of the public could allege a special duty on the basis of general public statements, liability would be "unduly and indeed indefinitely extended by this enlargement of the zone of duty". See Moch, 247 N.Y. at 168 159 N.E. 869. Taken to this extreme, the special duty doctrine would displace negligence-based tort law entirely. To recover, therefore, plaintiffs will have to show that defendants made promises directly to health care providers such as the plaintiffs. With that caveat, defendants' motion to dismiss Count VI is denied.

**5. Unjust Enrichment**

Liability for unjust enrichment rests on the equitable principle that a person "shall not be allowed to enrich himself unjustly at the expense of another." Miller v. Schloss, 218 N.Y. 400, 407, 113 N.E. 337 (1916); Manufacturers Hanover Trust Co. v. Chemical Bank, 160 A.D.2d 113, 559 N.Y.S.2d 704, 707 (1st Dep't 1990). A claim for unjust enrichment is available when "the acts of the parties or others have placed in the possession of one person money under such circumstances that in equity and good conscience he ought not to retain it." Miller, 218 N.Y. at 407; Manufacturers Hanover Trust, 559 N.Y.S.2d at 707. In Count X, plaintiffs allege that by paying the medical expenses of their participants for treatment of tobacco-related diseases, they "expended sums which Defendants had . . . a duty to pay" because the expenses were consequences of defendants' unlawful activities. Compl. ¶¶ 311-13. They argue that defendants have been unjustly enriched as a result.

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[10] Plaintiffs are not alleging that they were the intended third party beneficiaries of promises made to their participants. See Restatement (Second) of Torts § 324A (1965).

To recover for unjust enrichment, plaintiffs must show that "services were performed for the defendant[s] resulting in . . . unjust enrichment." Kapral's Tire Service, Inc. v. Aztek Tread Corp., 124 A.D.2d 1011, 508 N.Y.S.2d 777, 778 (4th Dep't 1986). "It is not enough that the defendant received a benefit from the activities of the plaintiff . . . ; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery." Kagan v. K-Tel Entertainment, Inc., 172 A.D.2d 375, 568 N.Y.S.2d 756, 757 (1st Dep't 1991); see also Schuckman Realty, Inc. v. Marine Midland Bank, N.A., 244 A.D.2d 400, 664 N.Y.S.2d 73, 74 (2nd Dep't 1997); Kapral's Tire Service, 508 N.Y.S.2d at 778. The expenses that plaintiffs incurred were paid at the behest of their participants. They did not confer a benefit on the defendants. The simple assertion that without those payments "defendants would have been liable for lawsuits by individual smokers seeking to recover the cost of their medical care," Pls.' Br. at 49, is too speculative to constitute a benefit accepted by the defendants. See Maryland v. Philip Morris Inc., 1997 WL 540913 at *16 (Md. Cir. Ct. 1997). Under these circumstances, the plaintiffs cannot establish that their actions unjustly enriched the defendants. Defendants' motion to dismiss Count X is therefore granted.

## V. CONCLUSION

Defendants' motion to dismiss the RICO claims stated in Counts I and II is denied.

Defendants' motion to dismiss the antitrust claims stated in Counts III and IV is granted.

Defendants' motion to dismiss the fraud claim stated in Count V is denied.

Defendants' motion to dismiss the breach of special duty claim stated in Count VI is denied.

The claims alleged in Count VII (strict liability), Count VIII (negligence), and Count IX (breach of express and implied warranties) are dismissed without prejudice with plaintiffs' consent.

Defendants' motion to dismiss the unjust enrichment claim stated in Count X is granted.

## APPENDIX C

LABORERS LOCAL 17 HEALTH & BENEFIT FUND and THE TRANSPORT WORKERS UNION NEW YORK CITY PRIVATE BUS LINES HEALTH BENEFIT TRUST,

Plaintiffs,

v.

PHILIP MORRIS, INC., R.J. REYNOLDS TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., B.A.T. INDUS. P/L/C/. LORILLARD TOBACCO CO., INC., LIGGETT & MYERS INC., THE AMERICAN TOBACCO CO., UNITED STATES TOBACCO CO., THE COUNCIL FOR TOBACCO RESEARCH-USA, INC., THE TOBACCO INSTITUTE, INC., SMOKELESS TOBACCO COUNCIL, INC, and HILL & KNOWLTON, INC.,

Defendants.

97 Civ. 4550 (SAS), 97 Civ. 4676,
97 Civ. 7346, 97 Civ. 8462, 97 Civ. 9395,
97 Civ. 9396, 97 Civ. 9397, 97 Civ. 9398,
97 Civ. 9399, 97 Civ. 9400,
97 Civ. 9401, 97 Civ. 9402

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

7 F. Supp. 2d 294

April 28, 1998, Decided
April 29, 1998, Filed

OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

On March 25, 1998, I denied substantial portions of defendants' motion to dismiss these complaints for failure to state a claim. Defendants now seek certification for interlocutory review of that order under 28 U.S.C. § 1292(b). Certification is appropriate when an order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and "immediate appeal from the order may materially advance the ultimate termination of the litigation[.]" 28 U.S.C. § 1292(b) (1994). Defendants raise three issues that they believe warrant immediate review:

1. Whether plaintiffs have pled a direct claim for injuries proximately caused by defendants, as is required to state a RICO claim.

2. Whether plaintiffs have pled injury to their business or property, as is also required under RICO.

3. Whether the Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-40 (1994), preempts plaintiffs' state law fraud and breach of special duty claims.

Questions one and two merely challenge the sufficiency of the pleadings. "It would seem axiomatic that appeals challenging pre-trial rulings upholding pleadings against demurrer could not be effective in bringing nearer the termination of litigation; on the contrary, they only stimulate the parties to more and greater pre-trial sparring apart from the merits." Gottesman v. General Motors Corp., 268 F.2d 194, 196 (2d Cir. 1959); see also Able v. United States, 870 F. Supp. 468, 471 (E.D.N.Y. 1994) (court "should not freely certify orders involving the sufficiency of pleadings"). If reworded more broadly, however, "the issues attempted to be formulated . . . [in those questions] can decisively advance the termination of this litigation." Gottesman, 268 F.2d

at 197. Accordingly, instead of defendants' questions one and two I will certify the following question:

> Whether, under the circumstances alleged in plaintiffs' complaint, economic injuries incurred by a union health care trust fund are purely derivative of the physical injuries which its participants suffered, and are therefore too remote to permit recovery as a matter of law.

The issue lies at the heart of this action, and recent decisions addressing the remoteness issue in tobacco liability cases have come to widely varying conclusions. Compare, e.g., City and County of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130 (N.D. Cal. 1997); Southeast Florida Laborers District Health & Welfare Fund v. Philip Morris, No. 97-8715-CIV, slip op. 1998 WL 186878 (S.D. Fla. Apr. 14, 1998); Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., No. 97-5344, slip op., 1998 WL 212846 (E.D. Pa. Apr. 22, 1998) (motions to dismiss granted on remoteness grounds); with State ex rel. Thomas J. Miller v. Philip Morris, Inc., 577 N.W.2d 401, (Iowa 1998) (interlocutory appeal; affirming decision dismissing four counts on remoteness grounds and rejecting remoteness argument for remaining five counts) and Maryland v. Philip Morris Inc., 1997 WL 540913 (Md. Cir. Ct. 1997); Texas v. The American Tobacco Co., No. 5-96CV-91 (E.D. Tex. Sept. 8, 1997) (motions to dismiss on remoteness grounds denied). There is manifestly substantial ground for difference of opinion. Because a reversal on this issue would likely result in dismissal of the case, the most efficient course is to seek review before the parties and the district court engage in protracted litigation. I therefore certify the above question for immediate review.

I also certify defendants' question three, as it also involves a controlling and potentially dispositive question of law "as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b).

Application for an appeal under § 1292(b) "shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." Id. As neither party is seeking a stay of pretrial proceedings during interlocutory review, pretrial discovery will continue throughout any § 1292(b) appeal.

SO ORDERED.

## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of July 1998.

Present: Honorable Ralph K. Winter,
Chief Judge,
Honorable Amalya L. Kearse,
Honorable John M. Walker,
Circuit Judges.

LABORERS LOCAL 17 HEALTH & BENEFIT FUND, et al.,

v.

PHILIP MORRIS, et al.

No. 98-8022

The application for leave to appeal pursuant to 28 U.S.C. § 1292(b) is granted.

FOR THE COURT:
CAROLYN CLARK CAMPBELL, Clerk.
/s/
By: Lucille Carr, Deputy Clerk.

Filed July 14, 1998.

## APPENDIX E

15 U.S.C. § 15: Suits by persons injured.

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only —

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

18 U.S.C. § 1964: Civil remedies.

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.